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No. _____

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IN THE

Supreme Court of the United States

October Term, 1991

HELEN PHILLIPS; CARSON K. WORKMAN; JOE AHLERS, a/k/a Uwe Ahlers, individually and on behalf of all others similarly situated,

Petitioner,

ALASKA HOTEL AND RESTAURANT EMPLOYEES PENSION FUND,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in reversing the finding of the district court that the trustees of the defendant multi-employer jointly-trusteed pension fund acted arbitrarily and capriciously, and perpetuated a structural defect so that the Fund was not administered for the sole and exclusive benefit of its participants, when they created and maintained eligibility criteria which they knew excluded 98% of the plan's participants from receiving any benefits at a time when the Fund had ample resources to expand eligibility, and used those resources instead to raise the benefits for the 2% who did qualify to as much as $5,000 per month?

2. Whether judicial reformation of plan eligibility rules was an appropriate remedy to correct this 98% exclusion rate?

3. Whether the statute of limitations should run from the first time any named plaintiff knew of a rule which subsequently proved to be excessively exclusionary, or whether the statute of limitations should begin running when the individual participant's application for benefits was rejected because of that rule?

PARTIES TO THE PROCEEDING

The named plaintiffs certified for a class composed of all participants of the Defendant Pension Fund on whose behalf three or more years of contributions had been made are: Helen Phillips, Carson K. Workman, and Joe Ahlers, a/k/a Uwe Ahlers. The Defendant is the Alaska Hotel and Restaurant Employees Pension Fund.

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GROUNDS FOR JURISDICTION

This matter was originally decided by an opinion of the United States Court of Appeals for the Ninth Circuit filed September 10, 1991. The matter was then the subject of a petition for rehearing and suggestion for rehearing en banc which resulted in an Order Amending Opinion and denying that petition and suggestion, which amendment was issued December 6, 1991.

The statutory provision which confers jurisdiction on this Court to review the judgment in question is 28 U.S.C. § 1254(1).

STATUTES IN QUESTION

The issues in this case emanate from the Labor-Management Relations Act of 1947, 29 U.S.C. § 186(cc)(5), and the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a)(1) (A)(i) and 1113.

II. STATEMENT OF THE CASE

A. Nature of the Case.

This is a class action under the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(5), and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1000, et seq., against the Alaska Hotel and Restaurant Employees Pension Fund ("Fund") and its trustees. The plaintiffs alleged that the Fund's eligibility rules were structurally defective, and arbitrary and capricious because they unreasonably excluded 98% of the plan's 58,000 participants from benefits. The Honorable William L. Dwyer of the United States District Court of the Western District of Washington certified the class and entered a judgment in favor of plaintiffs and the class after a two week bench trial.

The Court of Appeals for the Ninth Circuit, in a decision written by Judge Eugene A. Wright, joined by District Judge Philip M. Pro and in which Judge Diarmuid O'Scannlain concurred, reversed. In doing so, the Court declined to defer to Judge

Dwyer's findings of arbitrary and capricious conduct causing a structural defect in the Fund's eligibility criteria. In addition, the Court of Appeals held that the ERISA statute of limitations barred the action if adoption of the eligibility rules at issue -- as distinguished from the dates the named plaintiffs were informed they were not eligible for benefits -- was more than three years prior to the filing of the action. Petitioners submit this ruling is inconsistent with the decisions of other Courts of Appeals, as well as those of the Ninth Circuit, and is a substantial departure from established precedent and statutory requirement.

The matter was the subject of a petition for rehearing with suggestions for rehearing en banc, which requests were denied by an Order Amending Opinion on December 6, 1991. This Petition for Certiorari is submitted in response to that action.

B. Statement of Facts.

Joe Ahlers accumulated 13,914 hours of service in the Defendant Fund over nine years of employment between 1974 and 1985 (Ex. 8), but

the plan's eligibility rules and the inability to find continuous covered employment after the Trans-Alaskan Pipeline had been constructed combined to deny him any pension benefits whatsoever. Similarly, Carson Workman received nothing for the 13,542 hours of contributions made in his name (Ex. 12), and Helen Phillips forfeited the 6,020 hours of contributions made in her behalf (Ex. 6). Contributions were typically $2.00 or more per hour, which was more than 10% of the employee's total wage and benefit package (Ex. A-588). If any one of these plaintiffs had accumulated ten years of 435 hours each -- a total of 4,350 hours -- that person would have become vested in this plan. By amendments adopted in 1987 (after this suit was filed), 2,175 hours of contributions (five years of service) would have been sufficient to become one of the lucky 2% of plan participants who ultimately achieved eligibility (Ex. A-101, pp. 2-3). The irrationality of this disparity demonstrates, as the District Court recognizes, why the Defendant Trustees were arbitrary and capricious and why this

plan contained a structural defect that denied benefits to more than 56,000 of its participants.

The basic plan rules are not in dispute: A break in service pursuant to the minimum requirements of ERISA, a ten year cliff vesting program until 1987, and an alternative allowing benefits after 15,000 hours of contributions without a break in service. Although the plan always satisfied ERISA minimum vesting requirements, **98% of its participants never received a penny in benefits** (Ex. A-1). Thus, the case posits that trustees who knowingly continue a program which excludes 98% of the plan's population from any benefits, at the same time that they grant very large pensions to a favored few, have engaged in arbitrary and capricious conduct.

The undisputed facts, gathered by the Fund's own actuary, are that until 1987 (the year after the filing of this action) only 2% of the plan participants ever received a benefit. That number increased by less than another 1% after this litigation was initiated, when a 1987 plan amendment provided

five-year vesting to those who had not yet sustained a break in service. For the next two years on the basis that a person had to be in active contributory status at the time of the 1987 amendment to be eligible for its application. Then, in the face of the trial in this case and after their depositions had been completed, the trustees expanded five year vesting to include anyone who had not sustained a permanent break in service as of its 1987 adoption, thus adding fewer than 500 beneficiaries to the group of those eligible to receive benefits. Even then, more than 97% of all participants in this plan received nothing.

This exclusion is particularly offensive because the trustees always knew that the enormous number of participants who entered during the pipeline years would suffer this abuse. Even while the pipeline was being constructed, at least one trustee (who was also a union official) acknowledged there would be significant unemployment upon its completion. Nevertheless, when the trustees were asked to modify eligibility

standards so that participants would not suffer a break in service when they were unable to find covered employment at the end of the pipeline project, the trustees' response was to do nothing. At the same time, they continued increasing benefits for the few already able to satisfy eligibility rules.

Although the offending rules had been in effect during the late 1970's, their impact was not fully apparent until 1984 at the earliest, when the last regulatory barrier to their implementation was removed by special legislation exempting the fund from general ERISA rules which would have vested all participants. Like the named plaintiffs, many pipeline workers hoped to find sufficient covered employment elsewhere to qualify for some benefits, Mrs. Phillips' and Mr. Ahlers' last periods of covered employment were in 1985, and Mr. Workman continued until 1983. In part because they continued working, the named plaintiffs did not receive rejections of their applications for benefits until the middle 1980's. Indeed, the defendants'

first response to this lawsuit was a motion to dismiss for lack of ripeness based on the plaintiffs' failure to complete the Fund's internal review process at the time the complaint was filed. Under the traditional rule that the statute of limitations begins to run with rejection of the benefit application, the case was clearly filed in timely compliance with the Act.

Significantly, the plan always had sufficient assets to sustain more generous eligibility rules. On seven different occasions, the plan faced full funding, a phenomenon which required that either benefits be raised or eligibility rules relaxed so that employers could continue to receive tax deductions for their contributions. Each time full funding was imminent, the trustees opted to raise benefits for those already eligible, rather than to expand the group of eligible participants. Further, the use of actuarial assumptions which understated investment gains and overstated costs factors masked significant assets, which would only serve to magnify this point.

In 1979 the trustees were again informed that their plan appeared to have experienced a partial termination because of a 56% population loss within a single plan year. The normal rules under ERISA would require immediate vesting for all participants, even if they had only a single year of service, as a result of the partial termination, 26 U.S.C. § 411(d)(3). The trustees resisted this result through protracted negotiation with the Internal Revenue Service and, ultimately, lobbying Congress and obtaining a specific exemption from the partial termination rules for plans whose population loss had occurred after the pipeline construction. Even after the exemption had been enacted and they were assured that the plan would not have to pay benefits to everyone, the trustees still refused any benefits whatsoever to anyone who had fewer than ten years of service. At the same time, the trustees increased benefits to the 2% who did qualify. Full funding continued for at least four years thereafter.

Thus, the trustees perpetuated a program which denied benefits to 98% of the people on whose behalf they had accepted contributions and to whom they had a fiduciary obligation. As to the 2% fortunate enough to qualify, some received benefits in excess of $5,000 per month. By anyone's standards, $60,000 per year (plus Social Security benefits) more than replaces wage income lost at the time of retirement.

The trustees knew that only 1,548 of a total 58,042 participants qualified for benefits, and they knew why this took place. Although some plans have reciprocity agreements which combine credits in several different funds to avoid forfeitures, this plan had no reciprocity agreement, nor ever sought to achieve one with another fund in the same industry. While some plans allow self-payments by which participants can avoid a break in service through payment of their own contributions for a given period of time, this plan never offered such an option. Instead, this plan clung to the minimum vesting standards in ERISA so that only 2% of its

population achieved benefits. Again, the defendants could have used a graded vesting schedule allowing something at five years of service and a full benefit at 15 years, all at virtually no additional cost to the Fund, but they never did so. Even when the active contributory population dropped from 6,202 to 2,683 in a single year, the trustees did nothing to help any of those who lost their eligibility.

The trustees' responses to the forfeitures and denials caused by these eligibility rules have been extremely limited. In 1981, they adopted a 15,000-hour vesting alternative, but the Fund's actuary estimated that participants would average between 1,000 and 1,500 hours per year, the equivalent of ten-year vesting, so the fund allowed only 200 additional participants (out of a total population of 58,042) to achieve eligibility. The 2% success rate for participants here must be compared with the 10% to 15% success rate for participants of most multi-employer pension plans.

The trustees' consistent disregard of any participant who was a short service, high contribution pipeline worker is perhaps best demonstrated by their attitude while this very litigation was in progress. Although in June, 1988 the trustees set aside a $10 million "cushion" to pay for benefits if the court found liability in this case. Just eight months later they passed a resolution modifying their original five year vesting rule to extend eligibility to an additional 483 people at a cost of approximately $7,750,000, thus eliminating a large part of the reserve which had been set aside for the class. Only after being sued did they grant any relief to the plaintiff class, thus further demonstrating an unwillingness to consider the interests of those still ineligible under the challenged rules. During the two plan years prior to trial, the trustees committed nearly 25% of the Fund's assets to new benefits rather than increased eligibility opportunities.

At the same time, at least one employer trustee has benefited from the Fund's huge assets

by negotiating reductions in his labor contract's pension plan contributions to offset increases necessary to preserve health and welfare benefits. As of May 1, 1988, the contribution rate for the restaurant owned by Defendant Trustee Brown was reduced 40% to assure that his total labor cost package for pension and health benefits remained constant.

The primary reason for this egregiously disproportionate scope of benefit eligibility was the trustees' inadequate (if not antagonistic) response to the inevitable loss of employment opportunities at the end of the Trans-Alaskan pipeline project. When that work ended, participants could not find any way to stay in covered employment because there were too many people competing for too few jobs, and the cost of waiting for opportunities under the hiring hall system was unbearable.[1] Many

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[1]People had to be present in the hiring hall when a job was made available; absence meant being passed over. Employers could ignore that system by making, "special requests", sometimes even dependent on sexual favors. A trip from Fairbanks to the Anchorage hiring hall on the day a person's Fairbanks opportunity for referral came up meant loss

suffered involuntary breaks in service because they could not find work which was sufficiently frequent and continuous to retain eligibility. Although Joe Ahlers earned almost 14,000 hours of contributions, he suffered three different breaks in service in the process. Helen Phillips earned over 6,000 hours, but had three separate forfeitures, and Carson Workman earned 13,542 hours but suffered two different breaks in service. These people kept coming back to covered employment, but due to the ever-shrinking job market, they could not find work with sufficient frequency or stability to avoid these forfeitures. A vesting rule requiring three contributory years[2] would have granted eligibility to half the participants in the program, and five year vesting would have added 1,485 class members to those eligible before the lawsuit started.

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of that opportunity. And through it all, people had to pay for food, housing and sustenance while awaiting the call.

[2]The certified class was defined as those with three contributory years without a break in service.

After a two-week trial, Judge Dwyer entered a judgment in favor of the class. The judgment reduced the vesting period for pension benefits from ten years to five. It also required that the Pension Fund allow workers with four years of service to self-pay their fifth year and thereby qualify for a pension. As a result of these two changes, the number of participants who became eligible for vested benefits more than tripled, and the proportion of successful participants went from one-seventh of that typical in such funds to at least half the comparable factor in the industry. Contrary to the conclusion of the Ninth Circuit panel, this was a major improvement for trust fund beneficiaries.

In the end, the case comes down to a simple proposition -- a plan so rich that it hits full funding seven times, pays $5,000 monthly pension benefits, and reduces contribution rates to stabilize employers' net labor costs, can and should pay benefits to more than 2% of its participants. It is arbitrary and capricious for trustees to perpetuate a

program which they know excludes 98% of all participants from benefits.

III. SUMMARY OF THE ARGUMENT

Defendants' blatant disenfranchisement of the pipeline workers constitutes arbitrary and capricious conduct violative of both ERISA and the LMRA.

The Alaska H.E.R.E. Pension Fund was created pursuant to § 302(c)(5) of the Labor-Management Relations Act. That statute allows tax-deductible employer contributions to tax-exempt union-employer benefit plans such as this only if the plan is established for the "sole and exclusive benefit" of the employees and their dependents, 29 U.S. C. § 186 (c) (5). Where only a small subgroup of participants is receiving significant benefits, while the great majority of participants are ineligible to receive anything for the millions of dollars of contributions made on their behalf, the Fund may lose the protections of the LMRA and the plan may be deemed to have "a structural defect'. *Ponce v. Construction Laborers Pension Trust*, 628

F.2d 537 (9th Cir. 1980) (*Ponce I*); on remand 582 F. Supp.- 1310 (C.D. Cal. 1984) (*Ponce II*); aff'd, 774 F.2d 1401 (9th Cir. 1985) (*Ponce III*); *Music v. Western Conference of Teamsters Pension Trust Fund*, 712 F.2d 413 (9th Cir. 1983).

For more than 20 years, the courts have held that 'the protections of the [sole and exclusive benefit] section [of the LMRA] are primarily designed to assure that the trustees of a pension plan will award benefits to 'as many intended employees as is economically possible'" *Gaydosh v. Lewis*, 410 F.2d 262 (D.C. Cir. 1969), at 266, relied upon in *Ponce I*, *supra*, at 542. Even before the reforms of ERISA, the LMRA was construed to require that:

> a pension plan which excluded a sizeable number of union members, with no reasonable purpose behind their exclusion, may, in fact, fail to be for the sole and exclusive benefit of employees as Congress used that term .... *Insley*

v. Joyce, 330 F. Supp. 1228 (N.D. Ill. 1971).

The progeny of these decisions, including many from the Ninth Circuit, have consistently employed this analysis.

In *Mosley v. National Maritime Union Pension & Welfare Plan*, 438 F. Supp. 413, 424 (E.D.N.Y. 1971), the court succinctly described the unlawful structural defect inherent in exclusion of benefits to a significant number of employees:

> ... [Section) 302(c)(5) requires that the pension funds be applied for the benefit of *as many employees as is economically possible*. For example, it might be arbitrary and capricious to confer, without economic justification, pension benefits on a very few employees with extremely long service while denying benefits to a great number who worked substantial periods and thus had contributed to the pension fund through their labor. The loss of pension rights by significant numbers of

> employees with many years of service suggests an imbalance in the pension fund that is amenable to correction under § 302(c)(5) (emphasis added).

Where the trust has the financial ability to grant benefits, but will not do so, the trustees' conduct is not entitled to judicial deference. *Music*, *supra*. The focus must be on the totality of circumstances to determine whether trustees' conduct is arbitrary and capricious. *Ponce, supra*; *Gaydosh*, *supra*; *Roark v. Lewis*, 401 F. 2d 425 (D.C. Cir. 1968); *Miranda v. Audia*, 681 F. 2d 1124 (9th Cir. 1982).

The panel below did not disavow these standards. Instead, it reversed the trial court's findings of arbitrary and capricious conduct by the trustees and imposed its own findings to the contrary, seeking to minimize the impact of the 98% exclusion rate by making its own *de novo* determinations of the reasons for the exclusion and thus allowing its continuation. Then, in a major departure from precedent, the panel added that the

three year statute of limitations in ERISA barred this action because the offending rules had been adopted earlier, although that ruling contradicted the traditional test that the statute of limitations runs from the date the plaintiff's benefit application is rejected, not the date the excluding rule is adopted. As a practical matter, the latter point penalizes every participant who seeks to earn a pension under changing rules, because the participant must challenge an eligibility requirement before even knowing it will be applied to disqualify him or her.

The circumstances presented here -- an exclusion rate in excess of 98%, a huge surplus of assets, an extraordinarily large pension benefit to those few eligible to receive it, lack of either reciprocity or self-pay provisions, and onerous break-in-service rules -- demonstrate the trustees' failure to do anything for the 56,000 participants they have excluded from benefits eligibility. That fiduciary breach compels granting relief to those

participants who have been unfairly disqualified by this structural defect.

This is a case in which there are "special and important reasons" for granting certiorari. The Ninth Circuit panel not only substituted its own fact finding for that of the trial court, but also issued a ruling on the statue of limitations that is inconsistent with its own precedents and in conflict with numerous other court of appeals. Supreme Court Rule 10.1(a).

IV. ARGUMENT

A. THE PERPETUATION OF ELIGIBILITY RULES WHICH OBVIOUSLY EXCLUDED 98% OF PARTICIPANTS, PARTICULARLY WHEN NOT REQUIRED BY ACTUARIAL NECESSITY, WAS ARBITRARY AND CAPRICIOUS.

1. Introduction.

Judge Dwyer summarized this case in his twenty-seven page Memorandum Decision after the two week trial by concluding:

> The trustees' adherence to the 10-year or 15,000-hour credited service requirement, while

> increasing benefit levels on several occasions for the approximately 2% who could qualify, was arbitrary and capricious and constituted a structural defect in violation of 29 U.S.C. § 186(c)(5). Ponce II, 582 F. Supp. at 1318. The evidence would compel this conclusion regardless of which party had the burden of proof.

2. The Basic Principle.

Well before ERISA was enacted, the courts uniformly held that a Taft-Hartley trust had a structural defect if was not administered for the "sole and exclusive benefit" of the employees and their beneficiaries. *Gaydosh v. Lewis*, *supra*; *Insley v. Joyce*, supra. Only if a fund could not afford to expand its pool of participants for benefits would the exclusionary rule be sustained. *Roark v. Lewis*, 301 F. Supp. 526 (D.D.C. 1969), on remand from 401 F.2d 425 (D.C. Cir. 1968); *Miranda*, *supra*; *Souza v. Western Conference of Teamsters Pension Fund*, 663 F.2d 942 (9th Cir. 1981). But if the

Fund could afford to provide broader eligibility and did not do so, the disqualifying rule was deemed arbitrary and capricious. *Ponce I, supra*, at 544; *Knauss v. Gorman*, 583 F.2d 82 (3d Cir. 1978).

Sometimes the analysis only considered the statistics: *Ponce* focused on a vesting requirement which effectively excluded 96% of participants from benefits. *Ponce II, supra*. Other cases looked at the reasonableness of the challenged rule without making any statistical analysis. *Music, supra*; *Seafarers Pension Plan v. Surgis*, 630 F. 2d 218 (4th Cir. 1980). The unifying proposition of all these cases was a commitment to provide benefits to as many participants as possible within the Fund's ability to pay those costs.

As Judge Dwyer concluded:

> 4. The primary purpose of 29 U.S.C. § 186(c)(5) is to ensure that as many intended employees as is economically possible are awarded pension benefits. *Ponce v. Construction Laborers Pension Trust*, 582 F. Supp. 1310, 1317

(C.D. Cal. 1984) ("*Ponce II*"), *aff'd*, 774 F. 2d 1401 (9th Cir. 1985) ("*Ponce III*").

* * *

> 6. A pension fund is deemed to be "structurally deficient" when it arbitrarily and for no reasonable purpose excludes an unduly large number of participants from receiving pension benefits. *Ponce II*, 582 F. Supp. at 1317.

The Ninth Circuit panel agreed this was the applicable standard, holding that regardless of whether fund rules satisfied ERISA requirements, Section 302(c)(5) of the LMRA had to be satisfied as well (slip. op., 15559-15563): When the plaintiff has shown that the plan excludes "an 'unusually high' number of participants ... the trustees ... [must] show the reasonableness of the plan's eligibility requirements" (*Id.*, 15563). However, in spite of long-established precedent that the district court's determination of a structural defect due to arbitrary and capricious requirements

should be sustained unless "clearly erroneous", *Souza v. Trustees of Western Conference Teamsters Pension Fund*, 663 F.2d 942 (9th Cir. 1981); *Ponce III, supra*; *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986), the panel then treated this as a *de novo* review, citing *Miranda, supra* (slip. op., 15562) as its authority to do so. In *Miranda*, the trial court was sustained because it "had fully reviewed the reasons for the [challenged] 15-year rule and rendered thorough findings of fact. These findings are supported by the evidence and are not clearly erroneous" 681 F.2d, at 1127.

Here, however, the panel made an improper *de novo* determination. Despite the district court's finding that the reason for the 98% exclusion rate was arbitrary and capricious action by the trustees when they ignored the fact that their eligibility criteria -- without economic or actuarial need -- prevented more than 56,000 participants -- 98% of the plan population -- from ever qualifying for benefits, the panel declined to give credence to any of the lower court's fact-finding and conclusions on

this issue. Judge Dwyer rendered his own fully supported and thorough findings of fact for his conclusion that the reasons for this exclusion rate were arbitrary and capricious, yet the reviewing court refused to accept them and, instead, made its own conclusion that the "transient work pattern of employees" had not been adequately considered (slip. op., 15572). Then, rather than require a remand for further evidence on that point, the panel reversed because there was not "a stronger nexus between trustee conduct and the exclusion of unusually high numbers of participants." *Id.*

This departure from the accepted relationship between fact-finder and appellate-reviewer not only conflicts with the customary roles of the two courts, but ignores the realities the trial court saw: These trustees were arbitrary and capricious because they purposefully refused to consider increasing the scope of eligibility, the needs of almost all of their participants, and the Congressional policy favoring some kind of protection for all participants when a plan has a

huge population loss and can afford to protect the participants who are the victims of that loss. By ascribing the cause of the exclusion rate to the employees' inability to find continued covered employment, the panel put the burden of meeting participants' needs on the victims of unemployment rather than on the trustees whose fiduciary responsibility is to extend benefits to as many participants as possible. The trial court found that the trustees consciously refused to accept any duty to 98% of their participants; the panel reversed this finding by blaming the unemployed for failing to find work that did not exist.

3. The Fund's 98% Exclusion Rate.

The Fund's own actuary developed a table which demonstrated that, prior to the filing of this suit, fewer than 2% of all participants achieved vesting. By a 1987 amendment and a 1989 interpretive gloss, 483 of the 1,485 in the plaintiff class were able to gain vesting, but this still excluded 97.33% of all participants from pension eligibility.

The trustees were fully aware that their rules caused these results; reports from their actuary, requests from union business agents, and a government investigation all spoke of huge losses in plan population when the pipeline project concluded. In one year alone the plan dropped from 6,202 to 2,683 active participants (those with one or more years of service), and it has never again had even half its 1977 high of 7,004. The trustees knew as early as 1974 that a huge number of participants would never qualify for benefits. The proportion of vested participants went from 4.66% in the 1973-1974 plan year to 1.31% in the 1979-1980 plan year, and barely 2-2/3% even after the amendments which followed filing of this action.

4. Perpetuation of the Exclusionary Rules.

The trustees accepted contributions on behalf of any employee who worked one hour for a participating employer. Although they could have designed the plan otherwise, they consented to treat each of these employees as a participant, and

thus they had a fiduciary obligation to each of them.

The trustees also knew there was -- and would be -- enormous unemployment at the end of the pipeline project, for the hiring halls were choked with job applicants, and both fund and local union memberships were radically diminished. An Internal Revenue Service investigation initiated in 1980 questioned whether a partial termination had occurred, so the trustees knew the basic federal policy was to vest these unemployed participants immediately, with no minimum service requirement. While it is true that Congress ultimately exempted the Fund from these rules, it is obvious that the 1984 statute would not have been necessary if the general rule favoring earlier vesting did not apply to this situation.

Moreover, the break-in-service rule which caused these thousands of forfeitures failed to deal with the involuntary nature of most participants' unemployment. The general work opportunity was clearly diminished, and jobs in covered employment

were even more limited. Some union contracts did not provide pension fund participation, and many "town jobs" were so low paid that people could not afford to take them. The hiring hall system, complex, difficult to utilize, and riddled with special rules and favoritism, presented no viable alternative, for acceptance of a short term job which could not provide sufficient covered hours to avoid a break in service put the employee at the bottom of the list when he or she returned for a new assignment, and there were not enough long term assignments available to most pipeline workers to allow them continued pension eligibility.

The named plaintiffs graphically demonstrate the problem. Each was willing to go back to work in covered employment, and each did so even after suffering a break in service. Each had to survive between jobs, and their acceptance of jobs outside covered employment was no more than the acceptance of reality -- a response to their need for some kind of stable income when the unionized hotel and restaurant industry could not offer it.

Pauline Gravenstein, who did gain vesting, corroborated that the hiring hall system was a compound of favoritism, adherence to special employer requests, and union mismanagement which made consistent covered employment impossible unless the individual had curried favor with the hiring employer or a union official.

An involuntary break in service due to the unavailability of covered employment has consistently been treated as an excused absence, and plans which did not do so were held to be arbitrary and capricious. Thus, in *Lee v. Nesbitt*, 453 F.2d 1309 (9th Cir. 1971), a fund was not permitted to impose a break in service due to unavailability of covered employment, and in *Lavella v. Boyle*, 444 F.2d 910 (D.C. Cir. 1971), the same result was applied to an absence caused by a physical disability. Subsequent rulings have generalized this principle to allow other types of involuntary absence or to nullify unreasonable requirements such as one which mandated that the participant's last job be under a union contract.

Virtually every court faced with an involuntary break in service has taken *Lee v. Nesbitt* as a general prohibition of such disqualifications. *Van Fossan v. International Brotherhood of Teamsters Union Local No. 710 Pension Fund*, 649 F.2d 1243 (7th Cir. 1981). When a break-in-service rule is unreasonable in both concept and application, it is subject to judicial correction. *Snyder v. Titus*, 513 F. Supp. 926 (E.D. Va. 1981). Circumstances beyond the participant's control are not a favored basis for denial of benefits. *Rosen v. Hotel & Restaurant Employees & Bartenders Union of Philadelphia*, 644 F.2d 592 (3d Cir. 1981); *Norton v. I.A.M. National Pension Fund*, 553 F.2d 1352 (D.C. Cir. 1977). Hypertechnical rules which only serve to minimize the possibility of benefits after years of service must be viewed with great skepticism. *Phillips v. Kennedy*, 542 F.2d 52 (9th Cir. 1976); *Knauss v. Gorman, supra*; *Seafarers Pension Plan v. Faz, supra*.

The panel misconstrued plaintiffs position on this problem by saying defendant's break-in-service

rule was being challenged only on a statistical basis (slip. op., n.9). However, plaintiffs consistently argued that the inordinately high number of forfeitures caused by the rule here was due to the trustees' refusal to modify that requirement in view of obvious unemployment and lack of available work which qualified as "covered employment" under the plan.

In any event, the arbitrary and capricious nature of the trustees' actions in the instant case cannot be evaluated solely in the context of the break-in-service rule. The fundamental issue is the trustees' inadequate response to the obvious needs of 98% of the people to whom they owed a fiduciary duty to maximize the opportunity for benefits. This plan, awash with so much money it had to find new ways to spend it or stop accepting further contributions, could easily have given something to the tens of thousands of participants its trustees knew were unable to qualify for benefits.

Some plans allow self-payments to make up the missing contribution period necessary for eligibility; others enter reciprocity agreements in their industry to allow a pooling of service credits. Some plans have altered their vesting formula to make eligibility more easily achieved. Even in the face of government inquiry and pleas from union officials, these trustees did nothing until this lawsuit was filed. People like plaintiffs Ahlers and Workman had three times the minimum contribution hours necessary for a ten year vested pension, but were denied any benefit whatsoever. At the same time, there were people among the lucky few, including some union officials, who received pensions of more than $3,000 per month, and two in excess of $5,000 per month. This deliberate indifference to the legitimate needs of the people who built this Fund's assets was the arbitrary and capricious action which must be corrected.

The district court found that the trustees' complete failure to do anything for any of the pipeline workers, particularly in the face of these

alternatives which they refused to explore, demonstrated their fiduciary breach. If a trustee sees the enormous exclusion rate, knows why it is occurring, and refuses to do anything but lobby for special legislation to ensure the disqualifying impact of his plan's rules, the trustee has been arbitrary and capricious. Judge Dwyer found as a matter of fact:

> 74. The Plan's unusually high exclusion rate of about 98% of all participants (see Findings of Fact 35-42, supra) has been the result of the trustees' failure to adjust the Fund's restrictive vesting rules in the face of clear evidence that large numbers of participants, including but not limited to pipeline workers, had brought and were bringing major contributions to the Fund but were unable to stay employed long enough, or continuously enough, to qualify. In the face of repeated surpluses, the trustees, until the present case was

filed, increased benefits for a very few rather than easing the eligibility restrictions. In effect, the Plan treated the contributions of the great majority of camp workers as a windfall for a small number of retirees (in the form of increased pensions) and employers (in the form of reduced contributions). Taken together, and under the specific conditions of the hotel and restaurant trade in Alaska, the maintenance of the ten-year or 15,000-hour requirement, together with the strict break-in-service rule, in a situation where neither reciprocity nor a self-pay alternative was available to the workers, amounted to arbitrary and capricious conduct.

78. Approximately 1,485 class members have had at least five but less than ten years of credited service exclusive of breaks in service of less than five years. of those, approximately 484 have become vested as a result

of the Plan change (five-year vesting for those in parity) adopted in October 1987 and February 1989. Thus, approximately 1,002 class members with at least five years of service remain not vested.

79. It was not within the trustees' discretion to refuse to afford vesting to all participants with at least five years of credited service, exclusive of service breaks of less than five years. That was affordable and has clearly been called for at all times in the 1980's. The trustees' failure to afford vesting to participants at least to that extent has been and is arbitrary and capricious. Five-year vesting was adopted by the Plan in 1987, and since 1984 Congress has required that service breaks of less than five years be disregarded. In addition, because the pipeline construction took four years, and because members have not been able to plan their working lives with full knowledge

> of their pension rights, those who have had four years of credited service, not forfeited by breaks in service of five years or more, must be afforded a self-pay alternative to permit them to qualify for five-year vesting. The self-pay alternative should be based on payment of a contribution computed as follows: the number of hours needed for a credited year at the time the class member terminated from the Plan, multiplied by the average hourly contribution for that class member during his or her most recent 100 hours of covered employment.

As a matter of fact, the trustees ignored and abused the pipeline workers for the benefit of a small group who would form the 2% not excluded from benefits. The panel should have deferred to the trial court and accepted this finding of fact, but, instead, it departed from its own precedent to make a *de novo* determination that the disqualification even of those with five years of service was due to

their "transient work pattern" and not the trustees' failure to consider -- let alone attempt -- any moderation of the disqualifying rule.

The trustees' response to the full funding problem simply emphasizes their abuse of power. When the exemption from partial termination requirements would have allowed a rule granting vesting for some but not all of the class, the trustees did nothing for any of them, but raised the benefits for the lucky 2% who were already eligible.[3] When huge investment gains could have financed some expansion of eligibility, nothing was done for the class, but benefits were repeatedly raised for the lucky 2%. In the two years after the lawsuit was filed, the trustees committed 25% of plan assets to increased benefits, yet less than 1% of the total plan population were given the benefit of relaxed eligibility standards.

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[3]Trustee Phibbs was able to use a union office to raise her pension by hundreds of dollars per month, but (until this suit was filed) she never voted to expand the scope of eligibility or otherwise assist the participants who were members of the class.

The break-in-service rule, coupled with the ten year service requirement and the limited retroactivity of the 1987 amendment, has perpetuated a program which even today denies benefits to more than 97% of participants. Whether attributed to the break-in-service rule, the length of time necessary to become vested, the failure to grant some kind of excused leave of absence in the face of massive unemployment, the failure to pursue alternatives such as self-payment or reciprocity, or whatever other reason, the numbers simply end the discussion. To quote one expert, "This plan provides less than 2% coverage. That's bad."

As if to buttress a position it knew was unsupported within traditional analysis, the panel belittled the remedy ordered by the trial court because it did not go far enough. The reviewing court was not impressed with a 2% reduction in the exclusion rate if five-year vesting were made retroactive to 1973, or a 4% reduction if the self-payment option was also adopted (slip. op.,

15568), finding that the impact of this remedy on the exclusion rate was "minimal" (*Id.*, 15569). Perhaps a more appropriate response would have been remand to expand the group benefited by the district court's ruling. However, the panel did not challenge the district court's finding that an exclusion rate of 85 to 90% was typical of most multi-employer plans (*Id.*, 15568), which was dramatically lower than the defendant's 98% rate, nor that the remedy (which the trustees should have adopted on their on volition) would cut that disparity by more than half. Within the 10 to 15% success rate, in such funds, the correction would have been an increase from 2% to 7%.

Again, the panel noted that the "district court found that class members were responsible for contributions of approximately $23,900,000 ($47,000,000 with interest)" (*Id.*, 15558); the plaintiffs received absolutely nothing for that. In a plan which had some 1,500 participants who were qualified for benefits, the panel acknowledged that "five-year vesting would award benefits to up to

1,002 members of the plaintiff class. The Fund calculates that another 1,070 might be eligible for the self-payment option" (*Id.*, n.6). Of the 14% of plan participants with more than two years of service, half would benefit from the reforms ordered by the district court, while the trustees would limit that factor to one-seventh the number (*Id.*, 15568). These figures are totally inconsistent with the panel's determination that no action is warranted because the impact of this remedy would be "minimal" (*Id.*, 15569).

The Court of Appeals would require "a strong connection between arbitrary and capricious eligibility standards and the exclusion of unusually high numbers of employees", and it acknowledges that only "a fine line separates permissible discretionary action from arbitrary and capricious conduct" (*Id.*, 15569- 70). Yet the panel goes on to say the line has not been crossed here because it would have made a factual analysis different from that of the trial court, even thought it acknowledged that "[t]his is a close case" (*Id.*,

15570). If the panel had adhered to its own statement of deference to the trial court unless the initial decision was clearly erroneous (*Id.*, 15562), it could not have reversed the district court's ruling. That usurpation of the trial court's function -- in contravention of long-established rulings of its own and other circuits -- requires correction by this Court.

B. THE TRADITIONAL RULE THAT A PENSION ELIGIBILITY CLAIM ACCRUES ONLY AFTER AN APPLICATION FOR BENEFITS HAS BEEN DENIED, AS WELL AS THE CONTINUING VIOLATION RULE ADOPTED BY THIS COURT IN COMPARABLE CASES OF BENEFIT ADMINISTRATION, BOTH REQUIRE REVERSAL OF THE PANEL'S DECISION.

The panel divided on the appropriate treatment of the applicable statute of limitations. The trial court had held that a continuing violation occurred each month the defendants perpetuated their system of total disenfranchisement. Treating the causes of action as having accrued on the dates the plaintiffs' applications for benefits were rejected

would also have denied the Fund this defense. However, the panel treated the breach as the first date one of the named plaintiffs in the class action learned of the offending rule -- not the date of the rule's application to her. The majority never discussed this Court's decision in *Meagher v. I.A.M. Pension Plan*, 856 F.2d 1418 (9th Cir. 1981), *cert. denied*, 490 U.S. 1039 (1989), while the concurring opinion would avoid that precedent by calling on *Ziegler v. Connecticut General Life Insurance Co.*, 916 F.2d 548 (9th Cir. 1990), for the proposition that an entire class of working people should be held accountable to the date the trustees adopted rules which would not actually operate to deny them benefits until they reached retirement age and applied for pensions. Regardless of how the panel reached its statute of limitations decision, that decision is at odds with established Ninth Circuit precedent and in conflict with numerous other circuits.

"A plaintiff's ERISA cause of action accrues, and the six-year limitations period begins to run,

'when there has been 'a repudiation by the fiduciary which is clear and made known to the beneficiaries", *Miles v. New York State Teamsters Conference*, 698 F-2d 592, 598 (2d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983) (citations omitted). When the issue was whether a plan's eligibility rule allowed benefits to a "new group" of employees, "the plaintiffs did not receive due notice that the Board had repudiated their claim until the ... Plan ... denied [plaintiff] Miles a pension" (*Id.*, at 598). Again, in *Valle v. Jt. Plumbing Industry Bd.*, 623 F.2d 196 (2d Cir. 1980), the action accrued when offensive rules were actually applied to deny applications for benefits, not when they had been adopted some ten years earlier.

This is fully consistent with the treatment of benefit claims throughout the circuits, invariably making the denial of the pension application the point at which the statute of limitations begins. *See, e.g., Demisay v. Local 144 Nursing Home Pension Fund*, 935 F. 2d 528 (2d Cir. 1991); *Fogerty v. Metropolitan Life Ins. Co.*, 850 F. 2d 430

(8th Cir. 1988); *Dameron v. Sinai Hospital*, 595 F. Supp. 1404 (D. Md. 1984); *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987), *cert. denied*, 484 U.S. 979 (1987); *Central States Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098 (6th Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *Jenkins v. Local 705 Teamsters Pension Fund*, 713 F.2d 247 (7th Cir. 1983).

Denial of application as the accrual date is also consistent with the basic issue in this case: the fiduciary's duty to take some affirmative action to aid the participant in achieving eligibility. In *Rosen v. Hotel & Restaurant Employees Union, supra*, the Third Circuit found a breach in the trustees' failures to take any action to inform the employee of his problem or to help him avoid the problem by early corrective action. In *Toland v. McCarthy*, 499 F. Supp. 1183 (D. Mass. 1980), the offense was not the generic eligibility rule, but the trustees' failures to consider or develop a way for the individual participant to avoid disqualification under that rule. And in *Plasterers Local 202 v. Plasterers Local 60*,

710 F. Supp. 42 (E.D.N.Y. 1989), the structural defect was the trustees' failures to find some reciprocal arrangement to protect participants who moved between two funds, not the preexisting eligibility criteria under which that movement became a disqualifying event. It is only when a fiduciary applies the offending rule to the participant that a cause of action accrues and a statute of limitations begins to run.

None of the named plaintiffs received notice that their applications had been rejected until well within the three year statute of limitations period. Defendants appear to have the same view as to the proper date on which the cause of action accrued because they filed a motion to dismiss based on the plaintiffs' failure to complete the Fund's internal review process at the time the complaint was filed. How can an action defendants deemed not yet ripe, be tardy at the same time?

A more recent decision in the Ninth Circuit makes the point dramatically. In *Martin v. Construction Laborers Pension Trust for Southern*

California, 947 F.2d 1381 (9th Cir. 1991), decided a month after the initial opinion in this case, the court ruled that "an action to enforce rights under a pension plan accrues, and the statute of limitations begins to run, when there has been a clear and continuing repudiation of rights under the pension plan which is made known to the beneficiary" (*Id.*, at 1384). For the *Martin* plaintiff, that date occurred when he received a specific individual response to a pre-application inquiry he made about his own eligibility. That never happened with the plaintiffs in this action. Thus, even if the cases relying on a rejection of a benefit application as the appropriate accrual date are somehow distinguished, and even if the very well-reasoned dissent of Judge Pregerson in *Martin* (*Id.*, 1387-1389) were ignored,[4] this new and more restrictive

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[4]Judge Pregerson analogizes the situation to a breach of contract. He argues that the pension fund has a contract to perform with the participant which can be breached only at the time of performance, which is retirement. Thus, it is not until that point that a cause of action accrues. Earlier indications that the plan might deny benefits are insufficient. Judge Pregerson states that an anticipatory breach of contract is for a plaintiff's benefit, not a defendant's benefit. Thus, the

test the Ninth Circuit articulated in *Martin* would support the plaintiffs here.

Would the fund change its rules to deal with the unemployment to the end of the pipeline? Would it be required to vest all pipeline workers under the partial termination statute? Would it adopt some midway accommodation less than total vesting but more generous than earlier rules once the 1984 special legislation was passed to relieve fund obligations? Would the trustees treat the plaintiffs' breaks in service as involuntary and, therefore, excusable under *Lee v. Nesbitt, supra*? Should plaintiffs' file an action pending completion of the IRS investigation which might well have required immediate vesting or should plaintiffs wait and rely on the results of that investigation, as they in fact did? No plaintiff could know the answers to

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doctrine of anticipatory repudiation cannot force a plaintiff to bring suit earlier. Judge Pregerson notes persuasively that, if **that were not the case, plaintiff's lose their right to sue merely by asking about their pension right status, and those who do not ask maintain their claims.** *Martin, supra*, 947 F.2d at 1387-89.

these questions until his or her application had been processed or some other specific ruling (like that in *Martin*) had been made, and none of the plaintiffs received such direct communications until 1985 at the earliest.

The strong fundamental fairness and judicial efficiency rationales underlying actual pension application denial date as the date the statute of limitations commences running is aptly described in *Morgan v. Laborers Pension Trust Fund for Northern California*, 433 F. Supp. 518 (N.D. Cal. 1977):

> One might argue that the real wrong committed against plaintiffs occurred not on the date that their applications were denied, but on the date that their prior pension credit was automatically cancelled due to a break in service, or the date on which their service hours were first calculated unfairly or erroneously. ...
>
> While this "date of original wrong" argument

has some merit, the Court must reject it for a number of reasons. First, such a rule would put an almost intolerable burden on employees covered by pensions plans. It would require individuals who are unversed in the law to be constantly vigilant against possible abuses or errors by their pension fund years before they even apply for benefits, or lose the chance to vindicate their rights. ERISA, which was designed to protect the rights of potential pensioners, does not contemplate such a harsh rule. Moreover, claims filed before a pension actually has been denied might be chalienged for lack of ripeness. *Cf. United Public Workers v. Mitchell*, 330 U.S. 75, 86-91, 67 S.Ct. 556, 91 L.Ed. 754 (1947).

Requiring piecemeal challenges before an actual denial has occurred would also result in a great waste of judicial resources. Plaintiffs would file separate actions

> each time an alleged wrong occurred, rather than consolidating all claims in a single suit after their pensions were denied. ... The "date of original would also saddle courts with the extreme difficult task of determining exactly when abuses like errors in computation took place, compared to the simplicity and certainty of using the date that the pension application was denied.

Morgan, supra, 433 F. Supp. at 522 n.5. This rationale is at the heart of the plethora of federal decisions discussed above. The panel's decision here is plainly in conflict.[5]

The panel disavowed the nationally accepted treatment of ERISA benefit claims when the majority focused on the "earliest date" on which *one* of the named plaintiffs became aware of *one* breach, one

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[5] "The Department of Labor's enforcement efforts in the pension fund field will obviously be severely prejudiced if the *Phillips* statute of limitations ruling is allowed to stand, to say nothing of the decision's emphasis on an almost irrefutable defense of reliance on actuarial advice and a significantly heightened causation test."

failure to amend the vesting rules (slip. op., 15574-75).[6] Even if the named plaintiff were ineligible to pursue a claim because of a technicality like this, a class action will not be barred in its entirety. In *United States Parole Commission v. Geraghty*, 445 U.S. 386 (1980), the expiration of a named plaintiff's claim after a class has been certified was held not to be a bar to the action for the rest of the class, *Id.*, 445 U.S. at 402. It is in the nature of class actions that "vigorous advocacy can be assured through means other than the traditional requirement of a 'personal stake in the outcome' for the named plaintiff." *Id.*, at 403, relying on *Sosna v. Iowa*, 419 U.S. 393 (1975). "When the claim on the merits is 'capable of repetition, yet evading review,' the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation." *Geraghty, supra* 445 U.S. at 398.

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[6]The majority concedes that the record does not reflect whether all of the named plaintiffs had such early knowledge; at the least; this warrants a remand for fact-finding on that point.

Plaintiffs have sought, and the district court has granted, only prospective relief -- benefits for participants upon retirement. As Judge Dwyer found:

> At all relevant times since at least 1979 the trustees owed the class members the duty of easing the Fund's pension eligibility requirements at least to the extent of allowing vesting to those with five years of credited service, not forfeited by reason of breaks in service of five years or more.

The duties of the trustees did not just come and go; the trustees had a continuous obligation and duty to the class members. Just as ERISA imposes a "continuing duty" to review investments, *Buccino v. Continental Assurance Co.*, 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983), citing *Trustees of the Retirement Plan of the Pittsburgh Press Co. v. Equibank N.A.*, 487 F. Supp. 52, 62 (W.D. Pa. 1980), the trustees were obligated to assess continuously the impact of the plan eligibility rules,

and adjust them to meet the needs of the participants. In view of the trustees' continued nonfeasance, Judge Dwyer concluded that "[t]he trustees' arbitrary and capricious failure to perform that duty has been and is a continuing breach of fiduciary duty," The trial court did not impermissibly toll the statute of limitations; it found that the breach was continuous. "[T]he violation having continued to and after the date the suit was filed, the statute of limitations has not even been tolled yet." Therefore, "the statute of limitations does not bar any part of the claim."

The trustees' "system" continuously discriminates against the plaintiff class. Analogous "[e]xamples of typical continuing violations are allegations of unlawful hiring and promotion practices or allegations of unfair bias permeating an employer's personnel practices." *See, e.g., DiMaggio v. United States Postal Service*, 643 F. Supp. 1, 8 (D. Conn. 1984), citing *Milton v. Weinberger*, 645 F.2d 1070, 1075 (D.C. Cir. 1981); *Allen v. Amalgamated Transit Union Local 788*, 554

F.2d 876 (8th Cir. 1977), *cert. denied*, 434 U.S. 891 (1977). It was the defendant fund's unfair bias toward the plaintiff participants that permeated the trustees' pension benefit eligibility practices and constitutes the continuing violations in this case. The trustees' inactions were 'a continuing violation of the sort that obviates the need for timely filing." *Wingfield v. United Technologies Corp.*, 678 F. Supp. 973, 979 (D. Conn. 1988).

Even assuming, *arguendo*, that the trustees' violation was not classified as a "continuing violation", the claim here was nevertheless timely under 29 U.S.C. § 1113. "The statute of limitations begins to run when the claim accrues." *United Food and Commercial Workers Local 204 v. Harris-Teeter Super Markets, Inc.*, 716 F. Supp. 1551, 1560 (W.D.N.C. 1989). 29 U.S.C. § 1113(a) focuses on:

> ... the *last action* which constituted a part of the breach or violation, *or*
>
> (B) in the case of an omission, the *latest date*

> on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation ... (emphasis added).

The "last action" which was part of the breach occurred when a plaintiff applied for benefits and was denied. The trustees' adherence to the unconscionable vesting requirements and their actual denial of benefits pursuant to those rules has repeatedly occurred and is a separate breach each time.

Meagher v. I.A.M. Pension Plan, 856 F.2d 1418, 1422 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 1943 (1989), clarifies the accrual rule:

> To apply the limitations period, we must first isolate and define the underlying violations upon which [plaintiffs'] claim is founded.
>
> * * *

> [Plaintiff's] cause of action accrued only when his accrued benefits were decreased by an amendment of the plan .... The district court suggests that the passage of the inoperative amendment, or when [plaintiff] found out the amendment was passed, was the precise accrual date. We disagree. [Plaintiff] was harmed only by the wrongful *application* of the amendment (emphasis in original).

See also Edwards v. Wilkes-Barre Pub. Co. Pension Trust, 757 F.2d 52, 55 (3d Cir. 1985), *cert. denied*, 474 U.S. 843 (1985) (plan challenged as arbitrary and capricious; cause of action accrues when plaintiff retires and applies for benefits); *Struble v. New Jersey Brewery Welfare Trust Fund*, 732 F.2d 325, 332 (3d Cir. 1984) (the relevant conduct accruing the cause of action is the trustees, misuse of the assets); UFCW Local 204, 716 F. Supp. at 1560 (claim accrual does not occur until the trusteed explicitly refuse an individual's request for benefits); *Ballinger v. Perkins*, 515 F. Supp. 673,

676 (W.D. Va. 1981) (cause of action accrues when plan trustees deny application for benefits).

The date contributions were made on behalf of class members and the date of the trustees' initial breach are irrelevant. It is the most recent action or most recent opportunity to cure and the failure to do so which determines the accrual date. This principle of "equitable tolling" was specifically applied to pension benefit claims and 29 U.S.C. § 1113 in *Meagher*, 856 F.2d at 1423. The court stated that "[e]ach check issued to [plaintiff] in an amount reduced under the inoperative amendment constitutes a fresh breach by the trustees ...." Also, "each time defendants refuse to allow an individual unionized employee to participate in the plan, a new breach occurs and a new claim accrues." *UFCW Local 204*, *supra*, 716 F. Supp. at 1560 n.9.

Again, where a participant gains knowledge of the breach as the result of a challenged rule being applied to his or her own right to monthly benefits, a "fresh" limitations period runs from the

date each benefit check is due. *Meagher v. I.A.M. Pension Plan, supra*; *Dameron v. Sinai Hospital, supra*. "... Each month's denial [of benefits] constitutes a separate forfeiture and a separate wrong", *Riley v. MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977), at 411.

The concurring opinion below said "nothing in the vesting rules to which the plaintiffs object can be considered to have been added ... after 1983" (slip. op., at 15578). But each of the seven times the plan reached full funding and had to increase benefits, ease eligibility requirements, or jeopardize its tax status, the defendant trustees improperly chose to raise benefits rather than provide pensions of any kind for any members of the class. A new breach occurred and a "fresh" statute of limitations began with each of these decisions. Again, each time the trustees amended the plan insufficiently (*e.g.*, by adopting the 15,000-hour alternative (which only benefited 200 people), the first five-year vesting rule (which only aided those active within a year of its adoption), and then the

subsequent "interpretation" making the latter retroactive (but for only one-third of the class)), "fresh" breaches occurred and "fresh" statutes began. And when the trustees avoided statutory vesting under the partial termination rule as a result of the 1984 amendment to the Internal Revenue Code, a new problem appeared, a new choice was presented between benefits for a few and eligibility for more, and still another "fresh" statute of limitations began.

The foundation of this analysis demonstrates the divergence between established precedent and the case at bar. In *Meagher*, an improper eligibility rule was successfully challenged, yet the trustees continued to apply it to most participants. Those participants could not be expected to anticipate that the trustees, once put on notice of their rule's impropriety, would continue to apply it; therefore, "each check issued ... under the inoperative amendment constitutes a fresh breach . . . . A separate cause of action arises with the issuance of each check and the limitations period run separately

for each cause of action." *Meagher, supra,* at 1423. Each check in *Meagher* was a precise repetition of the earlier breach, with "nothing in the ... rules [which] ... can be considered to have been added" after the original breach" (slip. op., 15578). Each monthly check in *Meagher* was a precise duplication of earlier improper trustee action. The case presented an even more redundant succession of improper actions than the varied series of trustee choices, inadequate rules changes, and benefit increases presented in the instant case.

Nor does *Ziegler, supra,* detract from this analysis. Because a fully informed businessman had actual knowledge of a prohibited party-in-interest transaction, he could sue before actual injury occurred. However, this was acknowledged as "readily distinguishable" from "the fiduciary [in *Meagher* who] attempted to implement an invalid [benefit] contract amendment in violation of "ERISA." *Ziegler,* at 551. A breach based on a prohibited transaction may accrue as soon as it is known, for it need not and may never involve actual

damage. In contrast, a breach under the benefit rules occurs "only by the wrongful application" of the plan rule to the individual's rightful claim to a benefit. *Id*. The only way to reconcile *Meagher* and *Ziegler* is by the distinction between prohibited transactions in trust fund asset management and fiduciary breaches in the administration of benefit programs, the explanation which the Court gave in *Ziegler*, but which was not followed by the panel here.

V. CONCLUSION

The panel's decision acknowledged this is "a close case" involving a "fine line". Instead of applying two decades of decisions, the fulcrum of national standards affecting millions of workers and their families, the Ninth Circuit panel declined to correct an obvious abuse and invited trustees to continue testing "the limits of their discretion" at the expense of the participants to whom they owe fiduciary duties. In addition, the panel's two opinions on the statute of limitations issues splinter recent precedent and ignore rules so generally

accepted that defendants themselves tried to use those rules to dismiss this action when it was tiled.

For all of the reasons set forth above, plaintiffs request certiorari be granted in this very important litigation.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HELEN PHILLIPS; CARSON K. WORKMAN; JOE AHLERS, a/k/a Uwe Ahlers, individually and on behalf of all others similarly situated,	)	Nos. 89-35735 90-35144
Plaintiffs-Appellees, Cross-Appellants,	)	D.C. No. CV-86-1386-WD
vs.	)	ORDER AMENDING OPINION and DENYING PETITION FOR REHEARING AND SUGGESTION FOR PENSION FUND, REHEARING EN BANC
ALASKA HOTEL AND RESTAURANT EMPLOYEES	)	
Defendant-Appellant, Cross-Appellee.	)	

Appeal from the United States District Court
for the Western District of Washington
William L. Dwyer, District Judge, Presiding

A-2

Argued and Submitted
May 6, 1991 -- Seattle, Washington

Filed September 10, 1991
Amended December 6, 1991

Before Eugene A. Wright, Diarmuid F. O'Scannlain, Circuit Judges, and Philip M. Pro,* District Judge.

Opinion by Judge Wright; Concurrence by Judge O'Scannlain

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*Honorable Philip M. Pro, United States District Judge for the District of Nevada, sitting by designation.

SUMMARY

Labor

Reversing a district court judgment, the court of appeals held that a pension plan that excluded a high number of participants from vesting was not arbitrary and capricious conduct nor did it create a structural defect under § 302(c) of the Labor Management Relations Act (LMRA).

Appellant Alaska Hotel and Restaurant Employees Pension Fund was sued in a class action charging that the Fund's maintenance of restrictive vesting rules violated both § 302(c)(5) of the LMRA and § 404 of ERISA. The district court found that the Fund had violated the LMRA by failing to adopt vesting standards that would have allowed a greater number of participants to obtain benefits. The Fund had a break-in-service rule under which a participant forfeited all years and hours of credited service if he or she failed to work the annual minimum number of hours over a given number of years. The Fund

argued that the district court erred in concluding that the plan contained a structural defect and that the trustees acted arbitrarily and capriciously, and that the class action was time barred.

[1] The Ninth Circuit has long assumed subject matter jurisdiction over actions premised on the LMRA's "sole and exclusive benefit" provision. The court is not divested of jurisdiction simply because a plan has complied with minimum ERISA vesting standards. [2] The court disagreed that ERISA preempted or impliedly repealed § 302(c)(5) of the LMRA. [3] It did not follow that in enacting ERISA's ten-year minimum vesting period, Congress also intended to preempt actions under § 302(c)(5) of the LMRA. [4] Thus, the court held that a structural defect action may be maintained under § 302(c)(5) of the LMRA and a breach of fiduciary duty claim may be maintained under § 404 of ERISA notwithstanding a plan's compliance with minimum ERISA vesting requirements.

[51 A pension plan is structurally deficient when it arbitrarily and unreasonably excludes a

large number of participants from receiving benefits, thus failing to satisfy the § 302(c)(5) requirement that it be for the "sole and exclusive benefit" of all employees. A plaintiff carries the initial burden of showing that the plan excludes an "unusually high" number of participants. If the plaintiff does so, the burden then shifts to the trustees to show the reasonableness of the plan's eligibility requirements. [6] In evaluating the Fund's justifications for the high exclusion rate, previous decisions by the court do not engage in statistical line-drawing. Instead, the court carefully has considered a plan's justifications in light of the facts.

[7] A defined benefit plan is neither pure deferred compensation or pure incentive and reward; rather, it draws on both concepts. [8] Although the Fund's high turnover rate weakened its argument that the 10-year/15,000-hour requirement was rationally related to its goal of retaining career employees, the high rate gave credence to its argument that even if it had adopted five-year vesting, the exclusion rate would have been lowered only

slightly. [9] The district court's remedy of ordering five-year vesting reduced the Fund's exclusion rate by a mere two percent, from 97% to 95%. [10] The court could scarcely conclude that the Fund was structurally deficient when the remedy continued to exclude over 93% of plan participants. [11] Here, the district court discounted the transient nature of the work force. In light of the minimal impact that court's remedy had on the exclusion rate, it would be clearly erroneous to conclude that the overriding cause of the 97% exclusion rate was the Fund's restrictive vesting standards. By itself, this undermined the district court's finding of a structural defect. [12] The court noted that trustees have wide discretion to adopt or not to adopt eligibility standards that are more liberal than the ERISA minimums. [13] However, while such discretion is not limitless, a court may not intrude into the province of trustee decision-making unless a strong connection exists between arbitrary and capricious eligibility standards and the exclusion of unusually high numbers of employees.

[14] Although this was a close case, the court could not say that the Fund's failure to amend its standards so that another two to four percent of its participants could vest warrants judicial intervention. Trustee conduct that is consistent with reliance on the advice of an expert actuary supports a finding of no violation under § 302(c)(5). [15] In addition, there was no showing that elimination or modification of the break-in-service rule would so substantially reduce the exclusion rate that it was arbitrary of the Fund to retain the rule. [16] Neither was the trustees' failure to adopt reciprocity or self-pay provisions arbitrary and capricious.

[17] ERISA's three-year statute of limitations applied in this case. The court agreed with the Fund's argument that the plaintiffs did not satisfy the statute because each had actual knowledge of the trustees' alleged breach of fiduciary duty more than three years before the action was filed. [18] While the trustees' conduct could be viewed as a series of breaches, all were of the same character. Once a plaintiff knew of one breach, an awareness

of later breaches would impart nothing materially new.

Concurring, Judge O'Scannlain stated that the plaintiffs' complaint was untimely under the applicable statute of limitations; thus, there was no need to reach the merits.

COUNSEL

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ORDER

The opinion filed on September 10, 1991, is amended as follows:

Slip opinion at 12578, amend last sentence of second full paragraph to read:

> Judicial intervention in this complex area should be reserved for violations of the arbitrary and capricious standard which clearly cause excessive exclusion.

Slip opinion at 12579, amend first sentence of first full paragraph to read:

> We cannot say, however, that the Fund's failure to amend its standards so that another two to four percent of its participants could vest warrants judicial intervention.

Slip opinion at 12580, first paragraph, headnote 15, change paragraph to read:

> The district court also relied on its finding that the

> Fund's break-in-service rule contributed to the high exclusion rate by causing involuntary forfeitures of hours when employees were unable to find work that was covered under the Fund. There is no showing, however, that elimination or modification of the break-in-service rule would so substantially reduce the exclusion rate that it was arbitrary of the Fund to retain the rule.fn

The indicated footnote at the end of this paragraph will read:

> fn.The attack on the break-in-service rule in this case is based entirely on its alleged effect in excluding high percentages of workers from benefits. No argument has been made that the break-in-service rule is arbitrary simply because it makes no allowance for involuntariness of the break. *See Bolton v. Construction Laborers' Pension Trust*, No. 90-55654, slip op.

12211 (9th Cir. Aug. 30, 1991).

[Slip opinion at 12580, second paragraph, beginning "No additional role . . .", will then follow after the substituted paragraph.]

The panel has voted to deny the petition for rehearing, and Judge O'Scannlain has voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED** and the suggestion for a rehearing en banc is **REJECTED**.

OPINION

WRIGHT, Circuit Judge:

We consider here whether a pension plan that excludes a high number of participants from vesting violates the Labor Management Relations Act (LMRA). In particular, we consider whether the maintenance of restrictive vesting standards

amounts to arbitrary and capricious conduct or creates a structural defect under § 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5).

The Alaska Hotel and Restaurant Employees Pension Fund (the Fund) appeals a judgment that it violated the LMRA by failing to adopt vesting standards that would have allowed a greater number of participants to obtain benefits. Many participants whose pensions did not vest were former employees on the Trans-Alaska pipeline.

The Fund makes two arguments supporting reversal: (1) the district court erred in concluding that the plan contained a structural defect and that the trustees acted arbitrarily and capriciously, and (2) the plaintiffs' class action is time barred under the applicable statute of limitation. Finding no violation of the LMRA, we reverse the judgment of the district court.

BACKGROUND

The Fund was established in 1966 pursuant to an agreement between two local chapters of the International Union of Hotel and Restaurant

Employees and the Association of Alaska Hotel and Restaurant Owners. It is administered by a board of trustees comprised of an equal number of employer and union representatives. The trustees determine pension eligibility requirements and benefit levels.

The Fund was set up as a defined benefit plan. This type of plan pools contributions rather than segregating them in individual accounts. Employers make contributions on behalf of all employees regardless of the length of their employment. Participants receive specific benefits at retirement based on a formula focusing on years of participation in the plan. Non-vested participants do not receive benefits.

An employee's pension benefits vest when he or she has attained a certain number of hours or years of credited service. Over the years, the Fund has refined its vesting requirements. Its rules have at all times complied with the minimum vesting standards required under the Employee Retirement Income Security Act of 1974 (ERISA).

From 1973 to 1986, ten years of credited service were required before pension rights vested. Before 1976, a participant was required to work at least 500 hours in a calendar year to obtain one year of credited service; in 1976, this minimum was reduced to 435 hours. Effective May 1, 1976, and continuing to the present, an alternative provision enables a participant to vest after 15,000 hours of credited service, regardless of his or her years of credited service. Vesting was further liberalized after this action was filed: the trustees amended the plan to grant benefits to active participants with five or more years of credited service as of May 1, 1986.

The culinary trade in Alaska provides jobs in two very different environments: "town" jobs in the hotels and restaurants of populated areas, and "camp" jobs in the dining halls of remote construction sites. Workers in both types of jobs are participants in the Fund.

During construction of the Trans-Alaska pipeline, the number of camp employees increased

markedly. The surge in pipeline-related employment nearly trebled the total number of plan participants between 1973-74 and 1976-77, from 2,791 to 7,004. When pipeline construction ended in 1978-79, the number of participants decreased to 2,683.

This sharp drop represented primarily pipeline workers who had less than three years of service. Many of these former camp employees could not find employment after the pipeline was completed that would have allowed them to remain covered by the Fund. The Fund has always had a "break-in-service rule under which a participant forfeits all years and hours of credited service if he or she fails to work the annual minimum number of hours (435 hours since 1976) over a given number of years. The district court found that many members of the plaintiff class suffered involuntary breaks in service when their jobs ended and they were unable to find employment covered by the Fund.

The exodus of large numbers of pipeline workers with relatively few years of service increased the number of former participants whose

benefits never vested. As of 1970-71, 4.28 percent of Fund participants ultimately qualified for a pension benefit. By 1979-80, this percentage had dropped to 1.31. When this lawsuit was initiated in 1986, 2.67 percent of the Fund's 58,042 participants had qualified for benefits. The Fund's "exclusion rate" was thus 97.33 percent.

The Fund reached "full funding" in 1979, 1986, 1987 and 1988. Full funding exists when plan assets exceed the sum of its actuarial liabilities and the year's expected costs. Full funding may result in the loss of income tax deductibility for employer contributions and the imposition of an excise tax. The trustees voted to increase benefits to those already eligible in 1975, 1976, and 1980. They provided additional increases after this suit was filed.

Three named plaintiffs brought this class action in 1986 charging that the Fund's maintenance of restrictive vesting rules violated both § 302(c)(5) of the LMRA and § 404 of ERISA. The district court certified a plaintiff class consisting of all non-vested

participants on whose behalf contributions were made to the Fund after January 1, 1973, and who had three or more years of credited service, exclusive of any breaks in service of less than five years.[1]

Evidence was presented at trial that contributions to the Fund made on behalf of camp workers averaged $2.00 or more per hour from 1974-86. During this same period, contributions for town workers averaged $.30 to $.55 per hour. The district court found that class members were responsible for contributions of approximately $23,900,000 ($47,000,000 with interest).

The district court concluded that as early as 1974, the trustees knew or should have known that the pipeline project would dramatically increase the Fund's population, and that by 1977 many of the new participants would lose their camp jobs and probably forfeit their credited service under the

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[1]The three named plaintiffs had accumulated these hours of credited service: Joe Ahlers, 13,914 hours; Helen Phillips; 6,020 hours; Carson Workman, 13,542 hours.

Fund's then-existing rules. Focusing on the exclusion rate and the trustees' decisions to increase benefits rather than relax eligibility rules, the court found the trustees' conduct arbitrary and capricious. It held that maintenance of the 10-year/15,000-hour requirement was a structural defect that violated the LMRA. It concluded that neither the reduction of the annual service requirement to 435 hours nor the adoption of the 15,000-hour alternative materially improved the exclusion rate.

The court also examined the income-replacement ratio of those employees who ultimately received pensions. This ratio compares a retiree's pension income plus Social Security to his or her net income while last employed. The court found a LMRA violation partly because it concluded that a significant number" of fund retirees receive benefits exceeding I00 percent of what they last earned. The court's holding was also based on the Fund's lack of reciprocity[2] or self-pay[3] provisions.

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[2]Some pension plans have reciprocity agreements with other plans that permit workers who move from one

The court's remedy was premised on its conclusion that since at least 1979 the trustees owed class members the duty of easing eligibility rules. To remedy the structural defect, the court revised the Fund's eligibility rules, ordering five-year vesting retroactive to January 1, 1973. It also required the Fund to offer a self-pay option that would permit workers with four years of service to pay for the additional year needed to vest. Although the revisions were to be retroactive, the court did not award plaintiff class members past unpaid benefits. It simply granted full vesting from the date of judgment to those class members who qualified under the new rules.

DISCUSSION

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geographic area to another to avoid forfeiture of years of credited service. The court acknowledged that no such agreements exist in the hotel and restaurant industry.

[3]Some pension plans have self-pay provisions that permit participants to avoid forfeiture under a break-in-service rule by making their own contributions when they are without covered employment.

Before turning to the merits of the case and the statute of limitation issue, we address the Fund's argument that the court lacks subject matter jurisdiction over the LMRA and ERISA claims.

I. Subject Matter Jurisdiction

The Fund argues that a federal court lacks subject matter jurisdiction over an action to prove a structural defect under the LMRA when there is no evidence that the plan violated ERISA's minimum vesting standards. For that reason, it also contends that the court lacks jurisdiction over plaintiffs' claim that the trustees breached their fiduciary duties under ERISA.

[11 Although the Supreme Court has yet to address the issue directly, *see United Mine Workers Health & Retirement Funds v. Robinson*, 455 U.S. 562, 573 n.12 (1982). this circuit has long assumed jurisdiction over actions premised on the LMRA's "sole and exclusive benefit" provision. We are not divested of such jurisdiction simply because a plan has complied with minimum ERISA vesting standards. *See Hurn v. Retirement Fund Trust of*

Plumbing, Heating & Piping Indus., 703 F.2d 386, 391 (9th Cir. 1983).

[2] The Fund and amicus National Coordinating Committee for Multiemployer Plans (NCCMP) also argue that ERISA preempted or impliedly repealed § 302(c)(5) of the LMRA. We disagree. In enacting ERISA, Congress debated extensively the issue of vesting requirements before settling on a ten-year minimum for multiemployer plans.[4] It set the minimum at ten years, rather than a shorter time, partly because the additional expense of a shorter minimum would impede the adoption of new plans and the liberalization of existing ones. H.R. Rep. No. 93-807, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 4670, 4685-86. There is also evidence to suggest that Congress rejected a shorter minimum

[4]The ten-year minimum applies to multiemployer plans with collective bargaining agreements. Other types of plans must comply with shorter minimums. See 29 U.S.C. § 1053(a)(2)(A), (B), (C) (1988).

because it could undermine the interest of employers in retaining long-term employees.[5]

[3] It does not necessarily follow, however, that in enacting a statutory minimum, Congress also intended to preempt actions under § 302(c)(5) of the LMRA where a plan complies with the ten-year requirement. In rejecting a nearly identical argument, we said:

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[5]During the floor debate of a precursor bill to ERISA, Senator Bentsen stated:

> We have to remember that these are voluntary pension plans ... and one of the motivating reasons for putting in the plans is that employers want the employees to stay with them for a while, because they are going to spend money training those employees.... Then, we have to look at the fact that if we require very early vesting, that means that the employer has to allocate more of his pension contributions to younger employees who have a high turnover rate. As a result, the older employees will be penalized.

Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., 1 *Legislative History of the Employee Retirement Income Security Act of 1974*, at 1796-97 (1976) [hereinafter *Legislative History of ERISA*].

> The Fund's broader argument that ERISA preempts the [LMRA] on pension issues is equally untenable. Both the Supreme Court and this, court have recognized that the [LMRA] provisions parallel the ERISA provisions and that trustees must meet the requirements of each. Where Congress intended ERISA to repeal or supersede other laws, state or federal, it said so. But it said nothing about section 302(c)(5). ERISA was not to affect any federal laws not specifically mentioned, and it does not preempt Hurn's [LMRA] claim.

Hurn, 703 F.2d at 391 (citations omitted).

Because ERISA essentially codified the fiduciary standards of the LMRA, *see NLRB v. Amax Coal Co.*, 453 U.S. 322, 332 (1981), the ERISA ten-year minimum is most reasonably interpreted as just that: a statutory *minimum* that is intended to coexist with the fiduciary duties imposed by both ERISA and the LMRA. A shorter period may some-

times be appropriate and necessary to insure that eligibility rules operate for the sole and exclusive benefit" of employees.

Similarly, a shorter vesting period may be appropriate and necessary to insure that the trustees fulfill their fiduciary duties under ERISA. *See* 29 U.S.C. § 1104(a)(1)(A)(i) (1988) (trustees must act "solely in the interest of the participants and beneficiaries and - for the exclusive purpose of providing benefits to participants and their beneficiaries . . ."). As Senator Williams stated: "[ERISA's] provisions are only minimum standards, and no employer is impeded from building upon or improving these minimum requirements." *2 Legislative History of ERISA, supra* note 5, at 1601.

[4] We hold that a structural defect action may be maintained under § 302(c)(5) of the LMRA and a breach of fiduciary duty claim may be maintained under § 404 of ERISA notwithstanding a plan's compliance with minimum ERISA vesting requirements. This does not make ERISA compliance irrelevant. The court may consider such compliance

as a factor in determining whether the trustees' conduct was arbitrary and capricious or whether the plan was structurally defective.

II. Structural Defect Analysis

A. *Standard of Review*

"Courts are extremely reluctant to substitute their judgments for the judgments of trustees and will do so only if the actions of the trustees are not grounded on any reasonable basis." *Ponce v. Construction Laborers Pension Trust*, 628 F.2d 537, 542 (9th Cir. 1980)(*Ponce I*). Short of "plainly unjust" standards, trustees have wide latitude in formulating pension eligibility rules. *Id.* at 544. "A court should interfere only when the rule is unreasonable or its enforcement arbitrary." *Giler v. Board of Trustees*, 509 F.2d 848, 849 (9th Cir. 1974).

The questions whether the trustees have acted arbitrarily and capriciously or whether the plan contains a structural defect are mixed ones of law and fact. When reviewing the ultimate questions of arbitrary and capricious conduct and structural defect, this court has not accorded any special

deference to the district court's determinations. *See, e.g., Elser v. I.A.M. Nat'l Pension Fund*, 684 F.2d 648, 654 (9th Cir. 1982). We review de novo these ultimate conclusions. Underlying findings of fact are reviewed for clear error. *See Miranda v. Audia*, 681 F.2d 1124, 1127 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983).

B. *Application of § 302(c)(5)*

[5] A pension plan is structurally deficient when it arbitrarily and unreasonably excludes a large number of participants from receiving benefits, thus failing to satisfy the § 302(c)(5) requirement that it be for the "sole and exclusive benefit" of all employees. *Ponce I*, 628 F.2d at 543. The plaintiff carries the initial burden of showing that the plan excludes an "unusually high" number of participants. *Id.* If the plaintiff does so, the burden shifts to the trustees to show the reasonableness of the plan's eligibility requirements. *Id.* The district court's finding that the exclusion rate was excessively high is a finding of fact reviewed for clear er-

ror. *Ponce v. Construction Laborers Pension Trust*, 774 F.2d 1401, 1402 (9th Cir. 1985) (per curiam)(*Ponce III*), *cert. denied*, 479 U.S. 890 (1986).

Ultimately, we must decide whether the Fund's vesting standards were so arbitrary and capricious that they amounted to a structural deficiency. The district court's reasoning and remedy require us to consider the combined effects of the Fund's 10-year/15,000-hour vesting standard, break-in-service rule, lack of reciprocity and self-pay provisions and its decisions to increase benefits.

1. *Exclusion Rate*

The Fund's exclusion rate serves as evidence of the combined effect of its eligibility rules. The Fund argues that the district court misapplied the exclusion rate test by failing to take into account the high turnover in the hotel and restaurant industry. Although the Fund's work force was highly transient, this fact has little bearing on the threshold determination of whether the exclusion rate is unusually high. The trustees' fiduciary duties run to all participants regardless of their length of employ-

ment. The Fund's statistics relating to employee transience become relevant only after the burden has shifted to the Fund to justify its eligibility standards.

The district court found that an exclusion rate above 97 percent was unusually high. This finding was not clearly erroneous. The burden properly shifted to the Fund to show the reasonableness of its eligibility rules. *See Ponce III*, 774 F.2d at 1403.

2. *Reasonableness of the Fund's Eligibility Rules*

[6] In evaluating the Fund's justifications for the high exclusion rate, three of our decisions are on point: *Ponce I*, *Ponce III* and *Miranda v. Audia*. Both *Ponce* decisions and *Miranda* involved challenges to pre-ERISA, 15-year vesting rules that excluded 94 to 96 percent of all participants. In no case did we engage in statistical line-drawing. Instead, we carefully considered the plan's justifications in light of the facts.

In *Miranda*, we found no structural defect, grounding our conclusion on these facts:

(1) a high exclusion rate was due at least in part to the highly transient nature of construction laborers;

(2) the average age of employees qualifying for benefits had steadily decreased;

(3) the plan had adopted rules to relax eligibility requirements, including lowering the vesting age from 65 to 62 for those with 15 years of service, eliminating the retirement age requirement entirely for those with 25 years of service, relaxing its break-in-service rule, and establishing national reciprocity agreements with other plans;

(4) a reduction in the vesting requirement from 15 to 10 years would result in the vesting of an additional 445 employees out of a total of over 30,000 participants; this would not materially reduce the number excluded.

Miranda, 681 F.2d at 1125-26.

In *Ponce III*, we confronted a number of very similar facts. Distinguishing the plan in Miranda on the basis of the "redeeming steps [it] had taken to relax eligibility conditions," we found a structural defect. *Ponce III*, 774 F.2d at 1403. The plan in *Ponce III*, however, had adopted two of the very rules (the reciprocity agreement and the lowering of the retirement age) that we found so salutary in *Miranda*. *See Ponce v. Construction Laborers Pension Trust of S. Cal.*, 582 F. Supp. 1310, 1312-13 (C.D. Cal. 1984)(*Ponce II*), aff'd, 774 F.2d 1401 (9th Cir. 1985). In addition, while both cases involved a highly transient work force of construction laborers, we interpreted that fact differently in *Ponce III* than in *Miranda*. In *Miranda*, we suggested that the transience was a reasonable explanation for the high exclusion rate. 681 F.2d at 1125-26. In *Ponce III*, however, we viewed it as evidence that the plan's 15-year vesting requirement was not accomplishing its asserted goal of retaining employees. 774 F.2d at 1405.

The divergent results and sometimes divergent reasoning of these decisions suggests that our inquiry must be highly sensitive to the facts and circumstances confronting the Fund's trustees.

Before examining the justifications offered by the Fund, we turn to a statement in *Ponce I* that is hotly disputed by the parties and critical to our interpretation of the LMRA: "The primary purpose of section 302(c)(5) is to insure that pension benefits are awarded to as many employees as is economically possible." *Ponce I*, 628 F.2d at 544; *see Elser*, 684 F.2d at 656.

The plaintiffs interpret this statement as meaning that nothing short of economic necessity can justify excluding large numbers of plan participants. Because the Fund does not justify its high exclusion rate on financial or actuarial grounds, plaintiffs argue that "the numbers simply end the discussion."

The Fund and amici NCCMP and the Alaska Teamster-Employer Pension Trust argue that the *Ponce I* statement must be read narrowly. If the

statement means that providing benefits to the greatest number of participants is the compass guiding the court, they argue, then it conflicts with the underlying assumptions and goals of a defined benefit plan.

The *Ponce I* statement conceals a fundamental tension that affects the administration of any pension plan. Under one view, contributions to a pension plan are seen as deferred compensation, money that comes directly from employees' pockets. The employee's "right" to these deferred benefits is the same as his or her "right" to current wages. In a plan operating under a "pure" deferred compensation theory, employees would enjoy full and immediate vesting from the first day of employment. *See* Comment, *Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test*, 71 Cornell L. Rev. 986,1003-07 (1986).

Several courts have endorsed variants of the deferred compensation theory, pointing to statements in the legislative history of both the LMRA

and ERISA. *See Demisay v. Local 144 Nursing Home Pension Fund*, 935 F.2d 528, 533 (2d Cir. 1991) (employer contributions to a § 302(c)(5) plan "are in exchange for employees' labor, just as wages are"); *Knauss v. Gorman*, 583 F.2d 82, 89 (3d Cir. 1978)(concluding that drafters of § 302(c)(5) viewed contributions-as deferred compensation); *Mosley v. National Maritime Union Pension & Welfare Plan*, 438 F. Supp. 413, 424 (E.D.N.Y. 1977)(citing ERISA legislative history supporting deferred compensation-theory).

Others see a pension plan as an incentive system that enables employers to retain and reward long-term employees. Several courts, including this one, have recognized this rationale. *See Ponce I*, 628 F.2d at 542 (break-in-service rule is "intended to promote an employer's legitimate interest in the continuous employment of his employees"); *Mestas v. Huge*, 585 F.2d 450, 453 (10th Cir. 1978); *Roark v. Boyle*, 439 F.2d 497, 504 (D.C. Cir. 1970). ERISA's legislative history contains some support for the incentive/reward rationale. *See 1*

Legislative History of ERISA, supra note 5, at 1796-97. But if a "pure" incentive/reward system were implemented, trustees would have unfettered discretion to devise standards facilitating employee retention. This they do not have.

A modem defined benefit pension plan pools contributions for all workers, using the income generated by their combined financial clout, to provide reasonable pensions for workers who satisfy reasonable eligibility standards. The formula necessarily assumes that the pensions of a significant number of employees may never vest. *See Central States, S.E. & S.W. Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1154-55 (7th Cir. 1989)(en banc).

[7] A defined benefit plan is neither pure deferred compensation nor pure incentive and reward. It draws on both concepts. To apply properly the statement in *Ponce I*, we must recognize and balance these competing views. If our admonition that a plan award benefits to "as many employees as is economically possible" were taken literally, the de-

ferred compensation view would triumph. Eligibility standards would be set at the lowest possible threshold and benefits would be minuscule, diminishing rewards and incentives to the point of insignificance.

We proceed cautiously then to determine whether the plan suffered from a structural defect. The Fund begins by offering four explanations for its high exclusion rate: (1) its eligibility standards were the result of discretionary policy decisions designed to retain and reward workers by reallocating contributions from short-term workers to long-term workers; (2) the minimal effect that the district court's remedy would have on the exclusion rate demonstrates that the rate was attributable to high turnover in the hotel and restaurant industry and not to a structural defect; (3) it complied with ERISA vesting standards and implemented eligibility standards that, when adopted, were similar to or more liberal than comparable plans; and (4) it took steps to liberalize its vesting rules.

The first justification essentially relies on the incentive/reward rationale. Although this rationale may be reasonable in the abstract, our decision in *Ponce III* indicates that a plan must provide some evidence that vesting standards have operated to retain "career" workers. *See Ponce III,* 774 F.2d at 1405. The evidence before us does not show that the 10-year/15,000-hour rule significantly improved employee retention.

[8] Although the Fund's high turnover rate weakens its argument that the 10-year/15,000-hour requirement was rationally related to its goal of retaining career employees, the high rate gives credence to its argument that even if it had adopted five-year vesting, the exclusion rate would have been lowered only slightly. The Fund's evidence showed that more than 50 percent of its participants left the plan with less than one year of service. Eighty-six percent of participants departed with two years or less. Employee transience was a permanent feature of the Fund; even before pipeline

construction began, the exclusion rate exceeded 95 percent.

[9] The district court's remedy of ordering five-year vesting retroactive to 1973 reduces the Fund's exclusion rate by a mere two percent, from 97 percent to 95 percent. If every person in the four-year category chose the self-pay option, another two percent would vest, reducing the rate to 93 percent.[6] The district court found that a rate of 85 to 90 percent was typical for most multiemployer plans.

[10] In *Miranda*, the 10-year standard proposed by the plaintiffs would have reduced the rate from 96 percent to approximately 94.5 percent. We endorsed the district court's finding that this would not "materially reduce" the rate and, therefore, did not warrant finding a structural defect. *Miranda*, 681 F.2d at 1126; *cf. Ponce II*, 582 F. Supp. at

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[6]The district court calculated that five-year vesting would award benefits to up to 1,002 members of the plaintiff class. The Fund calculates that another 1,070 *might be eligible for the self-pay option.

1314 (adopting a ten-year standard rather than a 15-year standard "would have significantly increased the number of participants who would have vested")(emphasis added). We can scarcely conclude that the Fund is structurally deficient when the district court's remedy continues to exclude over 93 percent of plan participants.

The cautionary words of Judge Anderson, concurring in *Ponce I*, are apt here: "The trustees are dealing with a unique laboring force and are entitled to consider the many factors which render it unique when making their judgments in carrying out the trust." 628 F.2d at 545.

[11] Employee turnover was unusually high in the Alaska hotel and restaurant industry. Yet, the district court discounted the transient nature of the work force, concluding that "those factors are present to some extent in every industry." In light of the minimal impact that court's remedy has on the exclusion rate, it would be clearly erroneous to conclude that the overriding cause of the 97 percent exclusion rate was the Fund's restrictive vest-

ing standards. By itself, this undermines the district court's finding of a structural defect.

[12] Other factors also convince us that the plan was not structurally defective. The Fund argues that its compliance with ERISA vesting standards militates in favor of finding no structural defect. Although ERISA minimum vesting standards do not displace § 302(c)(5), we must understand the nature of the legislative compromise that produced the 10year standard. Implicit in that compromise is the notion that trustees have wide discretion to adopt or not adopt eligibility standards that are more liberal than the ERISA minimums.

[13] While such discretion is not limitless, a court may not intrude into the province of trustee decision-making unless a strong connection exists between arbitrary and capricious eligibility standards and the exclusion of unusually high numbers of employees. A comparison of the *Ponce* and *Miranda* decisions demonstrates that a fine line separates permissible discretionary action from arbitrary and capricious conduct. Where there is substantial

doubt whether that line has been crossed, we are reminded of our institutional limitations. Altering a pension plan's long-range actuarial assumptions can be risky business with repercussions extending to participants and times far beyond the case at hand. Judicial intervention in this complex area should be reserved for violations of the arbitrary and capricious standard which clearly cause excessive exclusion.

This is a close case. The Fund received substantial contributions on behalf of the non-vested plaintiff class, yet it repeatedly increased benefits for vested participants. Perhaps the Fund could have operated more equitably had it adopted a graded vesting schedule where participants with less than 10 years of service obtained a partial benefit. Alternatively, a savings plan might have distributed funds to more participants.

[14] We cannot say, however, that the Fund's failure to amend its standards so that another two to four percent of its participants could vest warrants judicial intervention. During the years

immediately after passage of ERISA, few plans, if any, provided for more liberal provisions than the minimum standards set forth in ERISA. *See* Rehon, *The Pension E.xpectation as Constitutional Property*, 8 Hastings Const. L.Q. 153, 195 (1980). Moreover, the Fund's actuary testified that he cautioned against expanding benefit coverage during the pipeline construction era. Trustee conduct that is consistent with reliance on the advice of an expert actuary supports a finding of no violation under § 302(c)(5). *Souza v. Trustees of W. Conference of Teamsters Pension Trust*, 663 F.2d 942, 947 (9th Cir. 1981).

In finding arbitrary and capricious conduct, the district court relied partially on its finding that a "significant number" of the Fund's vested retirees had income replacement ratios exceeding 100 percent. This finding appears to be based on evidence introduced by the Fund of projected pensions for two hypothetical retirees. What the court meant by

a "significant number" is not entirely clear,[7] but the evidence of excessive income-replacement ratios does not appear to be as strong here as it was in Ponce II. In that case, the district court found that benefit levels of vested retirees "far exceeded recognized standards" and that the ratio was "usually" in excess of 100 percent.[8] *Ponce II*, 582 F. Supp. at 1316, 1318.

[15] The district court also relied on its finding that the Fund's break-in-service rule contributed to the high exclusion rate by causing involuntary forfeitures of hours when employees were unable to find work that was covered under the Fund. There is no showing, however, that elimination or modifi-

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[7]A list of the Fund's pensioners shows that the majority receive less than $1,000 per month. It does not provide their income-replacement ratios.

[8]The *Ponce II* court found income-replacement ratios that averaged between 91 and 110 percent. 582 F. Supp. at 1315. The trustees in that case had expressly rejected a ten-year standard and corresponding monthly pension benefit calculated by the plan's actuary. *Id.* at 1313. The court found that this monthly benefit would have resulted in an income replacement ratio that averaged between 69 and 80 percent. *Id.* at 1315. These findings are more detailed and indicative of arbitrary and capricious conduct than the findings of the district court here.

cation of the break-in-service rule would so substantially reduce the exclusion rate that it was arbitrary of the Fund to retain the rule.[9]

No additional role played by the rule in discouraging some workers from pursuing covered employment appears to have been critical. We think the district court's reliance on the effects of the rule was secondary to its real concern-the operation of the 10-year/15,000-hour rule.

[16] The trustees' failure to adopt reciprocity or self-pay provisions was not arbitrary and capricious. As the district court noted, reciprocity agreements did not exist in the hotel and restaurant industry. As for a self-pay provision, the plaintiffs' own expert could identify only two pension plans that had this option.

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[9]The attack on the break-in-service rule in this case is based entirely on its alleged effect in excluding high percentages of workers from benefits. No argument has been made that the break-in-service rule is arbitrary simply because it makes no allowance for involuntariness of the break. *See Bolton v,. Construction Laborers' Pension Trust*, No. 90-55654, slip op. 12211 (9th Cir. Aug. 30, 1991).

We conclude that the trustees acted within their discretion in maintaining the Fund's eligibility standards, perhaps near the limits of that discretion. The district court did not consider adequately the Fund's evidence that the highly transient work patterns of employees in the hotel and restaurant industry skewed the exclusion rate. Judicial intervention in pension plan decision-making is inappropriate without a stronger nexus between trustee conduct and the exclusion of unusually high numbers of participants.[10]

III. Statute of Limitation

Although the foregoing disposes of the appeal on the merits, to avoid any inference that we approve of the district court's disposition of the statute of limitation issue, we address it briefly.

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[10]The district court's conclusions of law focused solely on the LMRA. The plaintiffs also assert that the Fund breached its fiduciary duties under ERISA. We reach the same result under ERISA § 404. The same standards apply to actions under both § 404 of ERISA and § 302(c)(5) of the LMRA. *See Music v. Western Conference of Teamsters Pension Trust Fund*, 712 F.2d 413, 418 (9th Cir. 1983).

[17] This case is controlled by the ERISA statute of limitation, 29 U.S.C. § 1113.[11] *See Kwak v. Joyce*, 683 F. Supp. 1546, 1549 (N.D. 111. 1988). The Fund argued that the named plaintiffs did not satisfy the statute because each had "actual knowledge" of the trustees' alleged breach of fiduciary duty more than three years before this suit was filed. In rejecting the Fund's argument, the district court characterized the trustees' failure to

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[11]Section 1113 provides:

> No action may be commenced ... with respect to a fiduciary's breach of any responsibility, duty, or obligation ... after the earlier of--
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach of the violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation ....

29 U.S.C. § 1113 (1988), *amended by* Pub. L. No. 101-239, title VII, § § 788(j)(4), 7894(e)(5), 103 stat. 2443, 2450 (1989).

relax eligibility rules as "a continuing breach of fiduciary duty and statutory violation." It concluded:

> If past unpaid benefits were sought in this case, the period of their availability, if any, would be limited by the ERISA statute of limitations. However, only prospective relief is sought--i.e., the vesting now of the pension rights of those unlawfully excluded so that they will have benefits from this point forward. That being so, and the violation having continued to and after the date the suit was filed, the statute of limitations does not bar any part of the claim.

The court's reasoning is based on a variation of the continuing violation theory employed most often in employment discrimination and antitrust cases. *See, e.g., Sosa v. Hiraoka*, 920 F.2d 1451, 1455-56 (9th Cir. 1990)(employment discrimination); *Eichman v. Fotomat Corp.*, 871 F.2d 784, 793-94 (9th Cir.)(antitrust), *amended on other grounds and superseded*, 880 F.2d 149 (9th Cir.

1989). Its application of that theory hinged on this concept of the alleged breach: the trustees were faced with numerous decisions where they could have relaxed vesting rules; they chose instead to maintain the status quo or to increase benefits for vested participants. The result was a series of discrete but related breaches. As each new breach occurred, the three-year limitation period of § 1113(2) began anew. Because the alleged breaches continued up to and after the filing of the suit, the three-year period was no bar.

[18] This application of the continuing violation theory founders on the plain language of § 1113(a)(2). This section requires the plaintiffs knowledge to be measured from the "earliest date" on which he or she knew of the breach. While the trustees' conduct may be viewed as a series of breaches, all were of the same character: a failure to amend vesting rules. Once a plaintiff knew of one breach, an awareness of later breaches would impart nothing materially new. *Cf. Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237-38 (9th

Cir. 1987)(in antitrust cases, the continuing violation theory requires an overt act that is new and independent, not merely a reaffirmation of a previous act; it must inflict new and accumulating injury on plaintiff). The earliest date on which a plaintiff became aware of any breach would thus start the limitation period of § 1113(a)(2) running. The district court's application of the continuing violation theory essentially reads the "actual knowledge" standard out of the statute.

Our analysis of § 1113 in *Ziegler v. Connecticut Gen. Life Ins. Co.*, 916 F.2d 548 (9th Cir. 1990), is not to the contrary. In *Ziegler*, we analyzed separately the issues of when a cause of action accrues under § 1113 and when the limitation period begins to run. *See Id.* at 550. The latter determination requires the court to apply the three- or six-year standard in the statute. *Id.* at 552. A continuous series of breaches may allow a plaintiff to argue that a new cause of action accrues with each new breach. But if the breaches are of the same kind and nature and the plaintiff had actual

knowledge of one of them more than three years before commencing suit, § 1113(a)(2) bars the action.

The record here indicates that, as of the late 1970s and early 1980s, at least one, and perhaps all, of the named plaintiffs may have had actual knowledge that the trustees had failed to relax vesting provisions so that more workers would benefit. The district court's erroneous application of the continuing violation theory prevented it from deciding this factual question. Our disposition of the merits makes its resolution unnecessary.

IV. Attorneys' Fees

The district court awarded attorneys' fees to the plaintiffs under the ERISA fee-shifting provision, 29 U.S.C. § 1132(g)(1), which provides that a "court in its discretion may allow a reasonable attorney's fee and costs of action to either party." We have said in dictum that this language permits an award of fees to a non-prevailing party. *See D'Emanuele v. Montgomery Ward & Co., Inc.*, 904

F.2d 1379, 1382-83 (9th Cir. 1990). But *see Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 829 (7th Cir. 1984)(losing party may not obtain attorney's fees under § 1132(g)(1)); *Fase v. Seafarers Welfare & Pension Plan*, 589 F.2d 112, 116 (2nd Cir. 1978)("An altogether sufficient support for the court's decision not to award attorney's fees under ERISA is that the attorney obtained no relief under the statute."); *see also Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983)(holding that analogous language in attorney's fee provision of Clean Air Act does not permit court to award fees to wholly unsuccessful litigant).

Even if § 1132(g)(1) permits an award of fees to a losing party, such an award would not be justified here. Under *Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980), we consider five factors in determining whether to award fees under § 1132(g)(1):

> (1) the culpability and good faith of the opposing party;

(2) the ability of the party to pay fees;

(3) the increased deterrence that would result from the award;

(4) whether a number of beneficiaries would benefit from the award of fees; and

(5) the relative merits of the parties' positions.

We conclude that all but the fourth factor favor a decision not to award fees. The fee award by the district court is reversed.

CONCLUSION

In light of the foregoing, we need not reach the other issues raised by the plaintiff class in its cross-appeal. The trustees' maintenance of restrictive vesting standards was not arbitrary and capricious and the Fund was not structurally defective. Plaintiffs are not entitled to attorneys' fees.

REVERSED.

O'SCANNLAIN, Circuit Judge, concurring:

I concur in the judgment and in Parts III and IV of the court's opinion. Although I do not necessarily disagree with the court's analysis of the questions addressed in Parts I and II, I do not believe that we need to address those questions in order to dispose of this appeal. The plaintiff's complaint was untimely under the applicable statute of limitations, and I would therefore reverse without reaching the merits.[12]

I

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[12]Although the parties and the court both characterize the question addressed in Part I of the court's opinion as a question of "subject matter jurisdiction," I do not perceive that question as jurisdictional at all. In my view, it is simply beyond dispute that the district court had proper subject matter jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § § 186(e) and 1132(e). What the parties have termed a jurisdictional argument is in reality a dispute over whether the factual evidence and legal analysis presented by the plaintiff class is sufficient to establish a prima facie case that the Fund has violated its obligations under ERISA and the LMRA. Properly understood, that is a merits argument, not a jurisdictional argument. Indeed, it is as much an argument on the merits as is the question addressed in Part II of the court's opinion: whether the plaintiff class established that the Fund's eligibility rules are structurally defective and arbitrary and capricious after all the evidence had been presented by both parties. The question in Part I is whether the Fund deserved summary judgment; the question in Part 11 is whether the Fund deserved a directed verdict or a verdict in its favor.

The applicable statute of limitations provides that:

> No action may be commenced ... with respect to a fiduciary's breach of any responsibility, duty, or obligation ... after the earlier of-
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or
> >
> > (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
> >
> > (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation ....

29 U.S.C. § 1113 (1988), *amended by* Pub. L. No. 101-239, title VII, § § 7881(j)(4), 7894(e)(5), 103 stat. 2443, 2450 (1989). As we recently explained

in *Ziegler v. Connecticut General Life Insurance Co.*, 916 F.2d 548 (9th Cir. 1990), the statute contemplates a two-part analysis: "First, when did the alleged 'breach or violation' occur; and second, when did [the plaintiff] have 'actual knowledge' of the breach or violation?" *Id.* at 550.

A

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Here, the plaintiff class has alleged that the Fund's restrictive vesting rules are (a) structurally defective and (b) arbitrary and capricious. The plaintiffs therefore contend that the eligibility rules themselves constitute the impermissible breach. Those rules, as revised to include all of the substantive provisions that the plaintiffs have identified as objectionable, were fully in effect by late 1976. The alleged breach had therefore occurred by the end of that calendar year, nearly a full ten years before the plaintiffs initiated this action on September 3, 1986. Accordingly, as the Fund argues, the plaintiffs' action is time-barred even under the statute's six-year provision and even without refer-

ence to the "actual knowledge" standard discussed in Ziegler. See 29 U.S.C. § § 1132(1)(A).

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At the very least, nothing in the vesting rules to which the plaintiffs object can be considered to have been added to those rules after 1983, and the record indisputably establishes that the plaintiffs had actual knowledge of how the rules operated by that time. Every member of the plaintiff class had lost entitlement to pension benefits by that time, and as their own testimony reveals, each of the named plaintiffs had become aware of this loss and of the termination of pension credits as 15579 far back as 1979 and 1980, in the period immediately following completion of the Trans-Alaska Pipeline. *See* Opening Brief for Appellant at 13-15 (citing trial record); Reply Brief for Appellant at 8-9 (same). Thus, it is even more clear under the statute's three-year provision and under the "actual knowledge" standard discussed in Ziegler that the plaintiffs' action is untimely. See 29 U.S.C. § § 1132(2).

B

In response to these arguments, the plaintiffs insist - and the district court held - that this suit involves allegations of a "continuing violation" and that the applicable limitations period therefore never expired. As our opinion correctly points out, however, this argument is overbroad. *See ante* at 15573-74. If the "continuing violation" rationale that we have applied in other contexts were as broad as the plaintiffs and the district court suggest, the "actual knowledge" provision in the statute would be superfluous and virtually no breach would ever grow stale so long as it remained unremedied. The plaintiffs and the district court have confused the failure to remedy the alleged breach of an obligation with the commission of an alleged second breach, which, as an overt act of its own, recommences the limitations period. *See Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1190 (9th Cir. 1984) (defining and applying the "continuing violation" rationale in an antitrust context), *cert. denied*, 469 U.S. 1213 (1985).

Moreover, even where a "continuing violation" does restart the limitations period, it can only preserve those claims allocable to the "restarted" period; untimely claims are not resuscitated by an invocation of this doctrine.

Our decision in *Meagher v. International Association of Machinists & Aerospace Workers' Pension Plan*, 856 F.2d 1418 (9th Cir. 1988), *cert. denied*, 490 U.S. 1039 (1989), upon which the plaintiffs rely, does not suggest otherwise. In *Meagher*, we held that repeated, practical applications of an allegedly improper amendment to the plaintiff's pension plan constituted a series of successive breaches - each of which commenced its own limitations period - because each application of the amendment reduced the amount of benefits to which the plaintiff would otherwise have been entitled. *See Id.* at 1422-23. By contrast, the plaintiffs here have identified no series of successive, overt acts. Rather, they challenge the implementation and operation of vesting rules that determine their threshold eligibility to receive pension benefits and

that were in full effect more than six years before the commencement of this action and of the operation of which they were certainly fully aware more than three years before the commencement of this action.

For these reasons and for the reasons expressed in Parts III and IV of the court's opinion, I concur.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HELEN PHILLIPS, et al.,

Plaintiffs,

v.

ALASKA HOTEL AND RESTAURANT EMPLOYEES PENSION FUND, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. C86-1386WD

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is entered for the plaintiffs and class members and against defendants, under the provisions of Fed. R. Civ. P. 54(b), in accordance

with The Final Order and Injunction filed herein on October 5, 1989.

October 5, 1989
Date

BRUCE RIFKIN, Clerk
Clerk

B-3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HELEN PHILLIPS, et al.,	)	
	)	
Plaintiffs,	)	C86-1386WD
	)	
v.	)	MEMORANDUM
	)	DECISION
ALASKA HOTEL AND RESTAURANT EMPLOYEES PENSION FUND, et al.,	)	
	)	
Defendants.	)	
	)	

I. INTRODUCTION

This case was tried to the court in May 1989. After the evidence was complete the parties submitted proposed findings of fact and conclusions of law, followed by replies to the opposing parties' proposals. On June 21, 1989, the court requested supplemental briefs and replies in regard to a possible "self-pay" remedy, and these were later filed. Defendants have asked that the affidavits and other evidentiary materials that accompanied plaintiffs' brief on self-pay be stricken. Because all parties had

rested, no order to reopen was entered or sought, and the proffered materials would be hearsay, the motion to strike is granted and the post-trial evidentiary materials referred to are stricken.

The three plaintiffs have sued for themselves and for a class of claimants who are or were participants in a pension plan existing under section 3(35) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(35). They claim that the trustees of the plan, through the adoption and enforcement of unduly restrictive rules, have denied retirement benefits to the plaintiffs and class members in violation of federal law. The defendants deny any liability. All testimony and exhibits received in evidence, and the parties' briefs and proposed findings and conclusions, have been fully. considered. To the extent specified in the following findings and conclusions, which are hereby made and entered under Fed. R. Civ. P. 52(a), the court finds that the defendants' denial of benefits has been arbitrary and capricious, and orders a remedy.

II. FINDINGS OF FACT

A. Facts Admitted in Pretrial Order

1. The court finds as facts all the facts admitted by the parties in the pretrial order.

B. History, Structure, and Rules of Fund

2. The Alaska Hotel and Restaurant Employees Pension Fund (the "Fund" or "Plan") was established in 1966 pursuant to an article and declaration of trust between Locals 878 and 879 of the International Union of Hotel and Restaurant Employees (the "HERE union"), located in Anchorage and Fairbanks, Alaska, and the Association of Alaska Hotel and Restaurant Owners. The Fund has been and is administered by a board of trustees composed of an equal number of employer and union representatives.

3. At least since 1967 almost all of the collective bargaining agreements negotiated by Locals 878 and 879 have required contributions to the Fund by the employers for each hour worked by an employee covered by a collective bargaining agreement. Such employment is called "covered

employment." The hourly contribution rates are established and adjusted periodically through collective bargaining between participating unions and employers.

4. The Fund is a defined benefit pension plan under section 3(35) of ERISA, 29 U.S.C. § 1002(35). Requirements for eligibility and levels of pension benefits from the Fund are determined solely by the trustees of the Fund.

5. The individual plaintiffs are former members of at least one local of the HERE union in Fairbanks and Anchorage, Alaska, and were participants in the Fund at least during their work in covered-employment during the mid-1970's through the mid-1980's at camp sites related to both the construction phase and subsequent maintenance phase of the Trans-Alaska Oil Pipeline (the "pipeline").

6. The named plaintiffs have brought this action for themselves and for a class of claimants certified by the court as all non-vested participants or former participants in the Fund on whose behalf contributions were made to the Fund on or after

January 1, 1973, and who had three or more credited years of future service in the Fund, exclusive of any breaks in service of less than five years. Plaintiffs in their second amended complaint seek an order requiring defendants to "provide plaintiffs and each class member a vested regular pension benefit or such alternative pension benefit as the court finds just." The pretrial order has not altered this prayer for relief. No compensation is sought for past unpaid benefits.

7. The individuals named as defendants are or were trustees of the Fund.

8. The trustees have at all relevant times established rules for the computation of benefits to participants whose pension rights vest under the Plan. For example, the Plan as worded in 1982, Exhibit A-13, calls for a monthly benefit to the retired person equal to the sum of his or her "past service benefit" and "future service benefit." "Credited past service" refers to years of industry employment before the worker's effective date of coverage. "Credited future service" refers to the

period of service for which employer contributions are required to be made to the Fund. The formula in Exhibit A-13, eliminating some complications not relevant to this summary, calls for a monthly pension benefit equal to $20 multiplied by the participant's years of credited past service, plus 3.69% of employer contributions required to be made to the Fund in his behalf for covered hours of employment before May 1, 1979, plus 3% of employer contributions required after that date.

9. Since the Fund's inception all persons working in covered employment, however brief their stay in the industry, have been deemed participants in the Plan, and employer contributions to the Fund have been made accordingly.

10. Until approximately 1971, the Fund's actuary considered all participants for all actuarial purposes. Beginning in 1972, the actuary reported only on those employees who had at least one year of credited service. The Fund has continued to receive and retain employer contributions for those with less than a credited year of service.

11. Between January 1, 1973, and April 29, 1976, "active participant" meant any participant who had obtained at least 500 hours of covered employment in the most recently completed plan year.

12. Since April 30, 1976, "active participant" has meant any participant who has obtained at least 435 hours of covered employment in the most recently completed year.

13. Since April 30, 1976, a "year of credited future service" has meant the credit obtained by an active participant in the Fund for each plan year in which he or she works 435 hours in covered employment. Before that date at least 500 hours per year were required.

14. The Plan originally required 15 years of credited service for a participant's pension rights to vest.

15. From January 1, 1973, to May 1, 1986, the Plan required ten years of credited service for a participant's pension rights to vest.

16. Effective May 1, 1976, and continuing to the present, as an alternative, a participant may obtain vesting with 15,000 hours of credited service. This Plan amendment was adopted on May 13, 1977.

17. An active participant at retirement age who has attained the tenth anniversary of his or her participation in the Fund, without a parity break (see Finding of Fact 22, below), may vest.

18. Effective May 1, 1986, and continuing to the present, the period for vesting was reduced from ten years to five years, with certain limitations.

19. The Plan has at all times had a "break-in-service rule" under which a participant would forfeit all years of credited service if he or she failed to have the required minimum, number of hours of yearly covered employment over a certain number of years.

20. The Plan originally provided that a break in service could result in a forfeiture if a par-

ticipant had two successive plan years without 500 (later 435) contributory hours.

21. In 1978, the trustees revised the break-in-service rule to provide that a forfeiture would occur as the result of a single plan year in which a participant failed to have 435 hours of contributory service.

22. As a result of the requirements of ERISA, the break-in-service rule has operated since the enactment of that statute under what is known as the rule of parity, in that for every year of credited service the participant must be afforded an equal length of time to return to the Plan and avoid forfeiture of the hours earned prior to the break in service. An amendment to ERISA enacted in 1984 now requires that the parity period be at least five years, i.e., that breaks in service of less than five years may not result in forfeiture. Retirement Equity Act of 1984, Pub. L. No. 98-397, § 102(d), 98 Stat. 1426, 1426-27 (1984) (codified at 29 U.S.C. § 1053(b)(3)(D)).

23. Some pension plans have "self-pay" provisions which permit a participant to avoid the forfeiture that would otherwise occur under a break-in-service rule by making his or her own contributions during a period outside covered employment. The Fund has never had such a provision.

24. some pension plans have reciprocity agreements with other plans to permit workers who move from one geographic area to another to avoid forfeiture of years of credited service. No interstate agreements of this nature exist in the hotel and restaurant industry. The Fund has never had or sought a reciprocity agreement.

25. As of 1986-87, the Plan's total participants from the beginning totalled 58,042. Of those, 1,548, or 2.67%, had qualified for benefits.

C. <u>Fluctuations in Number of Participants</u>

26. The hotel and restaurant industry in Alaska is subject to extreme fluctuations. The work available for HERE union employees is of two types. There are "town" jobs in hotels and restaurants in urban or semi-urban areas. There are also jobs at

remote construction sites, commonly called "camp" jobs.

27. The construction of the pipeline, begun in 1974 and completed in 1977, caused the number of participants in the Plan to more than double. When the pipeline was finished, the number of participants dropped by about sixty percent over two years. The statistics are as follows:

Plan Year	Active Participants (Those With One or More Years of Credited Service)
1973-1974	2,791
1974-1975	4,483
1975-1976	6,522
1976-1977	7,004
1977-1978	6,202
1978-1979	2,683

28. The elimination of many camp jobs was the main reason for the sharp decline in the number of participants after 1977.

29. As early as 1974, the trustees knew, or should have known, that the pipeline project would result in a dramatic increase in the Fund's

population, and that by about 1977 many of the new participants would lose their camp jobs and probably would forfeit their hours and years of credited service under the existing rules of the Plan.

30. Since 1978-79 the numbers of active participants in the Plan have been as follows:

Plan Year	Active Participants
1979-1980	2,656
1980-1981	2,940
1981-1982	3,235
1962-1983	3,316
1983-1984	3,215
1984-1985	2,885
1985-1986	2,440
1986-1987	1,990
1987-1988	1,789

D. Contributions to Fund by Class Members

31. The class, as noted above, consists of the non-vested participants or former participants in the Fund in whose behalf contributions were made to the Fund on or after January 1, 1973, and who had three or more credited years of future service exclusive of any breaks in service of less than five years.

32. The members of the class have been responsible for contributions of approximately $23,900,000 to the Fund. With interest at the plan's reported rates of return, the total traceable to these contributions is approximately $47,000,000.

33. The contributions made to the Fund in behalf of those class members with five through nine years of credited service have been approximately $10,000,000. When interest at the Plan's reported rates of return is added, the total is over $21,000,000.

34. The contribution rate for camp workers averaged $2.00 or more per hour, while that for town workers ranged from about $.30 to $.55 per hour, in the period 1974-86. At least since 1974 the trustees have known, or should have known, that the camp workers were contributing substantially more per person to the Fund than the town workers.

E. Percentage Able to Qualify for Benefits; Exclusion Rate

35. As of the 1970-71 Plan year, before construction of the pipeline began, 4.28% of all Plan participants ultimately qualified for a pension benefit. Almost 6% of those defined as "active participants" (i.e., who had at least one full year of service) qualified for a benefit. The exclusion rates the percentages of those who could not qualify for benefits were thus approximately 95.7% and 94%.

36. As the result of an influx of participants, and Plan rules which prevented them from qualifying for benefits with anything less than ten years or 15,000 hours of contributory service, the number of total participants ultimately eligible for vested benefits dropped to 2.54% for Plan year 1973-74 and to 1.31% for the 1979-80 Plan year. The exclusion rate remained in excess of 98% through 1986 and was 97.33% in 1987.

37. If the eligibility rate of participants is measured by those who have attained at least one full year of service, the percentage of participants eligible for vested benefits was 4.66% for the

1973-74 Plan year and 2.94% for the 1979-80 Plan ear. The exclusion rate measured in this way was over 95% through 1986 and was 93.75% in 1987.

38. While many participants in the Plan have been short-service employees, that cannot justify disregarding them in computing the qualification and exclusion rates. The Plan has elected to treat all covered employees as participants and to receive contributions from their employers however brief their service. Accordingly, the short-term workers are owed fiduciary duties by the trustees and must be counted in computing the exclusion rate.

39. The use of a 435-hour minimum in defining a year of credited service has worked to the advantage of seasonal employees, such as those who work only in the summer, but has not substantially benefited those who need year-around employment and therefore cannot take seasonal jobs. The 435-hour threshold has not substantially reduced the exclusion ratio.

40. The exclusion rate has not been materially improved by the trustees' adoption in 1977 of a 15,000-hour vesting alternative. Although some camp employees worked as many as 3,200 hours a year, the estimated average used by the Plan was 1,500 hours per year, which would make the 15,000-hour rule the rough equivalent of ten-year vesting. The Plan's estimate was that a town worker would average 1,100 hours per year. Only about 200 additional participants, out of a total of 58,042 participants ever in the Plan, have qualified for benefits as a result of this provision.

41. From Plan year 1973-74 until the Plan year ending April 30, 1987, after the present lawsuit was initiated, the Plan excluded approximately 98% of all participants and approximately 94% of "active" participants from receiving any pension benefit.

42. Most multi-employer pension plans provide benefits to approximately 10-15% of their participants. The eligibility rate of the Fund has been unusually low, i.e., the exclusion rate has

been unusually high. This is true even considering the prevalence of short-term employees. The burden is accordingly on the trustees to show the reasonableness of the requirements. *See* Conclusion of Law 12, infra. For the reasons stated in these findings, the burden has not been sustained.

F. **Trustees' Responses to Development of Fund Surpluses and Population Loss**

43. "Full funding" of a pension plan exists when actuarial liabilities are less than plan assets after expected costs for the year are considered. Full funding entails the possible loss of income tax deductibility of employer contributions and the possible imposition of an excise tax.

44. The Plan reached full funding during Plan years 1979, 1985, 1986, 1987, and 1988. As of the last published valuation for the Plan year ending April 30, 1987, the Plan had a stated surplus of nearly $18,000,000.

45. From the start of the pipeline project in 1974 until the present lawsuit was filed in October 1986, the trustees consistently utilized the sur-

pluses to increase benefits to hose already eligible, by at least 100% over time, but did not relax the eligibility requirements to grant benefits to those participants who had not become qualified under the ten-year or 15,000-hour rule.

46. On November 18, 1975, the Plan actuary recommended the adoption of additional benefits to avoid the creation of full funding.

47. During the 1975-76 Plan year, the trustees gave a 20% benefit increase to retirees and increased future service benefits by 25%. On March 26, 1976, the trustees voted to double the past service benefit and increase the future service benefit another 20%.

48. Before and during the Plan year ending April 30, 1980, the Plan could have afforded a five-year vesting rule. However, instead of expanding eligibility the trustees authorized additional benefit increases, raising future service amounts another 20%. They also increased the past service benefit by 25% to $12.50 and raised the past service benefit to $20.

49. The foregoing steps were taken to avoid a surplus which would have brought about a full funding situation.

50. Because of the large drop in the number of participants after the pipeline was completed, the Internal Revenue Service ("IRS") began an investigation in September 1980 to determine whether partial termination of the Plan had occurred. Partial termination would have resulted in full vesting for all participants with one or more years of service. 26 U.S.C. § 11(d)(3), *amended by* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 552, 98 Stat. 896, 896-97 (1984).

51. The trustees had notice of the IRS investigation and the bases for it.

52. The IRS investigation continued until April 1984 at which time the Plan benefitted from legislation which created an exemption for population losses in Alaska pension plans due to completion of the pipeline. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 552, 98 Stat. 896, 896-97 (1984) (not codified). This legislation followed lob-

bying efforts in behalf of this Fund and other Alaska pension funds.

53. On October 15, 1987, after the present lawsuit was filed, the trustees adopted a plan amendment granting vested benefits to active participants with five or more years of credited service as of May 1, 1987, at an estimated cost of $1,333,000.

54. On June 29, 1988, the trustees voted to set aside a $10,000,000 "cushion," or reserve, for potential liability in the present case.

55. On February 9, 1989, the trustees resolved that their intention in adopting the modified vesting rule in October 1987 had been to extend five-year vesting to all persons who were within parity as of May 1, 1987. This resulted in pension benefits to an additional 483 participants at an additional cost of approximately $7,761,000. A large part of the $10,000,000 reserve set aside for the lawsuit on June 29, 1988, was, in effect, used for this extension of benefits.

56. The effect of the five-year vesting measures adopted in October 1987 and February 1989, whether or not intended, was to grant part of the relief requested in behalf of the class members herein.

57. The defendants have contended that it was reasonable to limit five-year vesting to those who were within parity on May 1, 1987, because the beneficiaries would be those who had contributed to the Fund while its investments appreciated during the bull market of the 1980s. however, the Fund assets that were then appreciating existed in large measure because of contributions made in behalf of earlier participants.

58. During the last two reported Plan years, the trustees have committed nearly 25% of the Fund's assets to additional benefits, in large part increased benefits for those who were eligible under the prelawsuit rules.

59. The Trustees have not acted to enlarge the group eligible for benefits by easing the break-in-service rule (although Congress has limited its

application), by adopting reciprocity agreements that would permit workers to avoid forfeiture while working outside Alaska, or by adopting a self-pay provision.

60. During the past two years, some employers have negotiated reductions in their employees' pension contribution rates o offset increases in contributions to a health and welfare plan. For example, as of May 1, 1988, the contribution rate for he restaurant owned by defendant trustee Brown dropped 40%. The negotiators for the union included union trustees of the Plan.

G. Income Replacement Ratio

61. An income-replacement ratio compares a retiree's pension income plus Social Security to his or her net income earned while last employed.

62. A significant number of Plan retirees receive benefits which reflect an income-replacement ratio in excess of 100%. Benefits at that level exceed the norm for Taft-Hartley multiemployer plans. Two retirees receive pensions of more than $5,000 per month.

H. Shortage of Covered Employment; Operation of Break-in-Service Rules

63. During the period 1977 to date, the number of jobs available in covered employment has been far less than the number in existence during the pipeline construction. See Findings of Fact 27 and 30, supra.

64. Defendants, citing the high turnover rate of employees in the industry, contend that covered employment has been available, especially in the towns, to the pipeline workers and others whose jobs ended. However, as a practical matter that as not been the case. Some unionized jobs have been outside he pension plan. There have been waiting lists, and difficulties in getting assigned out, at union hiring halls. The high cost of living in Alaska has made it difficult to wait for a job to appear. On balance, the evidence shows that covered jobs have not been available to the extent necessary to accommodate all those who wanted to stay in Alaska.

65. In addition, there are major differences in compensation, hours of work, and working conditions between camp and town employment. Some camp workers did not seek town jobs when their camp work ended.

66. To the extent that participants were unable to find covered employment, they suffered involuntary breaks in service. Forfeitures of years of credited service often occurred because the Fund's break-in-service rules did not distinguish between voluntary breaks and those caused by the worker's inability to get a covered job.

67. Neither the trustees nor the Plan administrator kept any records indicating whether or not a person's break in service was voluntary, nor was any distinction made in the actuarial reports.

68. Plaintiff Helen Phillips was a member of Local 879 and participated in the Fund from Plan year 1974 through Plan year 1985. She had four years of service, totalling 6,020 hours, beginning in 1975, with three separate forfeitures by the Fund due to breaks in service in 1980, 1983, and 1984.

69. Plaintiff Joe Ahlers was a member of Local 879 and participated in the Fund during 1974-77, 1980-82, and 1984-85. He accumulated 13,914 hours of service and suffered breaks in service in 1980, 1984, and 1988, resulting in a forfeiture of 11 of his hours.

70. Plaintiff Carson Workman was a member of Local 879 and participated in the Fund during 1974-77 and 1980-83. He accumulated 13,542 hours of service and suffered forfeitures in 1979 and in 1988.

71. Under the ten-year vesting rule a worker could qualify for benefits with ten credited years of service comprising 4,350 or more covered hours in the aggregate. Under the five-year vesting rule adopted in 1987 and further interpreted in 1989, a participant could qualify with five years of service comprising 2,175 or more covered hours in the aggregate. In contrast, the three named plaintiffs have failed to qualify although their covered hours were 6,020 (Phillips), 13,542 (Workman), and 13,914 (Ahlers).

72. Each plaintiff's breaks in service were largely due to an inability to find covered employment, or satisfactory covered employment, in a shrinking job market. In this respect, their experience was typical of that of class members who wanted, but could not get, covered employment after the pipeline was finished.

73. The break-in-service rules that produced results such s the foregoing had the effect of forfeiting credited pension ears and hours although the participant's absence from covered employment was involuntary.

I. Extent to which Plan Has Acted Arbitrarily and Capriciously; Remedy

74. The Plan's unusually high exclusion rate of about 98% of all participants (see Findings of Fact 35-42, *supra*) has been the result of the trustees' failure to adjust the Fund's restrictive vesting rules in the face of clear evidence that large numbers of participants, including but not limited to pipeline workers, had brought and were bringing major contributions to the Fund but were unable to

stay employed long enough, or continuously enough, to qualify. In the face of repeated surpluses, the trustees, until the present case was filed, increased benefits for a very few rather than easing the eligibility restrictions. In effect, the Plan treated the contributions of the great majority of camp workers as a windfall for a small number of retirees (in the form of increased pensions) and employers (in the form of reduced contributions). Taken together, and under the specific conditions of the hotel and restaurant trade in Alaska, the maintenance of the ten-year or 5,000-hour requirement, together with the strict break-in-service rule, in a situation where neither reciprocity nor a self-pay alternative was available to the workers, amounted to arbitrary and capricious conduct.

75. The defendants' primary expressed reasons for adhering to their policies have been that many participants are transitory and without dedication to the trade, and that pensions should be adequate for those who do make a career of the work. Those factors are present to some extent in every

industry, and they do not suffice to justify the extremely high exclusion rate that Plan participants have experienced.

76. It would have been reasonable for the Plan to afford vesting to all participants with at least three years of credited future service, exclusive of any breaks in service of less than five years, as requested by plaintiffs. However, it was within the trustees' discretion to decline to do that.

77. The defendants have recognized that a participant with five years or more of service is not a transitory but a long-term, employee in this industry. For example, in their Proposed Finding of Fact 31 they refer to an employment "core of permanent long-term employees" that is "identifiable by a stable number of persons with five or more years of service."

78. Approximately 1,485 class members have had at least five but less than ten years of credited service exclusive of breaks in service of less than five years. Of those, approximately 483 have become vested as a result of the Plan change

(five-year vesting for those in parity) adopted in October 1987 and February 1989. Thus, approximately 1,002 class members with at least five years of service remain not vested.

79. It was not within the trustees' discretion to refuse to afford vesting to all participants with at least five years of credited service, exclusive of service breaks of less than five years. That was affordable and has clearly been called for at all times in the 1980s. The trustees' failure to afford vesting to participants at least to that extent has been and is arbitrary and capricious. Five-year vesting was adopted by the Plan in 1987, and since 1984 Congress has required that service breaks of less than five years be disregarded. In addition, because the pipeline construction took four years, and because members have not been able to plan their working lives with full knowledge of their pension rights, those who have had four years of credited service, not forfeited by breaks in service of five years or more, must be afforded a self-pay alternative to permit hen to qualify for five-year vesting.

The self-pay alternative should be based on payment of a contribution computed as follows: the number of hours needed for a credited year at the time the class number terminated from the Plan, multiplied by the average hourly contribution for that class member during his or her most recent 100 hours of covered employment.

80. When the foregoing measures are taken, the exclusion rate will still be over 90%.

81. To summarize, to rectify the past arbitrary and capricious conduct, and to moderate the unduly high exclusion rate, the Plan must, at a minimum, afford full vesting now to those class members (i.e., all non-vested participants in whose behalf contributions have been made to the Fund on or after January 1, 1973) who have had five or more years of credited service, not forfeited as a result of breaks in service of five years or more, with a self-pay provision for those with four years of credited service as specified above. As for the future, the Plan as it now stands (five-year vesting regardless of service breaks of less than five years)

does not reflect arbitrary and capricious conduct and need not be amended.

82. The Fund can provide the remedy specified above without reducing benefits.

J. Statute of Limitations

83. The trustees' failure to ease the Fund's pension eligibility requirements at least to the extent of allowing vesting to those with five years of credited service, not forfeited by reason of breaks in service of five years or more, as been and is a continuing breach of fiduciary duty and statutory violation. *See* Conclusion of Law 19, *infra*.

III. CONCLUSIONS OF LAW

1. Jurisdiction is vested in this court pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(1); 29 U.S.C. § 186; and federal question jurisdiction pursuant to 28 U.S.C. § 1331.

2. 29 U.S.C. § 186(c)(5) imposes traditional fiduciary duties upon the trustees of an employee trust and requires that such a trust be operated for the sole and exclusive benefit of its partici-

pants. *Burn v. Retirement Fund Trust of the Plumbing, Heating and Piping Indus.*, 703 F.2d 386 (9th Cir. 1983); *Ponce v. Construction Laborers Pension Trust*, 628 F.2d 537 (9th Cir. 1980) ("*Ponce I*").

3. The decisions of those empowered to administer employee trust funds will be sustained unless arbitrary or capricious. *Miranda v. Audia*, 681 F.2d 1124, 1125 (9th Cir. 1982).

4. The primary purpose of 29 U.S.C. § 186(c)(5) is to insure that as many intended employees as is economically possible are awarded pension benefits. *Ponce v. Construction Laborers Pension Trust*, 582 F. Supp. 1310, 1317 (C.D. Cal. 1984) ("*Ponce II*"), *aff'd*, 774 F.2d 1401 (9th Cir. 1985) ("*Ponce III*").

5. A federal court's review of trust fund plans is based upon 29 U.S.C. § 186(c), and is limited to consideration of "structural deficiencies." *Turner v. Local Union No. 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979).

6. A pension fund is deemed to be "structurally deficient" when it arbitrarily and for no reasonable purpose excludes an unduly large number of participants from receiving pension benefits. *Ponce II*, 582 F. Supp. at 1317.

7. A trust which is structurally deficient does not operate nor inure to the sole and exclusive benefit of all employees. *Id*.

8. The issue here is whether certain Plan provisions, namely the ten-year or 15,000-hour credited service requirement, coupled with the break-in-service rule and the lack of reciprocity and self-pay provisions, operated in a manner that was arbitrary or capricious or contrary to law so as to amount to a structural deficiency. *Miranda*, 681 F.2d at 1125.

9. Initially, the burden of proof rests with plaintiffs to show that the above-mentioned Plan provisions excluded an unusually high percentage of participants from receiving pension benefits. *Ponce III*, 774 F.2d at 1402.

10. There is no set formula to determine whether an "exclusion rate" is unusually high. An appropriate pool of potential beneficiaries consists of all workers on whose behalf employers made contributions to the trust, regardless of whether they were "career employees." *Ponce III*, 774 F.2d at 1403.

11. In 1987 the Fund provisions excluded approximately 97.33% of all participants from receiving pension benefits. The exclusion rate at that time of those with one year or more of credited service was 93.75%. For the previous thirteen years the exclusion rate for all participants was in excess of 98% and for "active" participants in excess of 95%. These exclusion rates were unusually high. *Ponce II*, 582 F. Supp. at 1317.

12. Plaintiffs having met their initial burden of proof, the burden shifts to the trustees to show the reasonableness of the Plan provisions. *Ponce III*, 774 F.2d at 1402.

13. In determining the reasonableness of the Plan provisions, the fact that in 1975-76 and

1980-81 the trustees chose to increase the then-existing benefit levels for both past and future service vested retirees instead of extending benefits to other participants must be considered. *Ponce II*, 582 F. Supp. at 1317.

14. The level of benefits adopted by the trustees in 1975-76, and particularly in 1980-81, were unusually high as evidenced by an income-replacement ratio that exceeds 100% for many vested retirees. *Id.*

15. Absent a substantial and verifiable justification, it is arbitrary and capricious for trustees to maintain a vesting requirement with a high exclusion rate and at the same time pay an unusually high level of benefits. *Ponce I*, 628 F.2d at 544.

16. The defendants have failed to sustain their burden of proof to show that the maintenance of an unusually high exclusion rate, and the increases of benefits in the face of repeated fund surpluses, were reasonable.

17. The trustees' adherence to the ten-year or 15,000-hour credited service requirement, while

increasing benefit levels on several occasions for the approximately 2% who could qualify, was arbitrary and capricious and constituted a structural defect in violation of 29 U.S.C. § 186(c)(5). *Ponce II*, 582 F. Supp. at 1318. The evidence would compel this conclusion regardless of which party had the burden of proof.

18. At all relevant tines since at least 1979 the trustees have owed the class members the duty of easing the Fund's pension eligibility requirements at least to the extent of allowing vesting to those with five years of credited service, not forfeited by reason of breaks in service of five years or more. The trustees' arbitrary and capricious failure to perform that duty has been and is a continuing breach of fiduciary duty. The breach has recurred each year the trustees have failed to act, through the time the suit was filed and to the present date.

19. If past unpaid benefits were sought in this case, the period of their availability, if any, would be limited by the ERISA statute of limitations. 29 U.S.C. § 1113(a); *cf. Meagher v. International*

Ass'n of Machinists & Aerospace Workers Pension Plan, 856 F.2d 1418 (9th Cir. 1988). However, only prospective relief is sought -- i.e., the vesting now of the pension rights of those unlawfully excluded so that they will have benefits from this point forward. That being so, and the violation having continued to and after the date the suit was filed, the statute of limitations does not bar any part of the claim.

20. The minimum action that the trustees must take to rectify the past denial of benefits, and to moderate the unduly high exclusion rate, is to afford full vesting now to all class members who have had five or more years of credited service, not forfeited by reason of breaks in service of five years or more, and, in addition, to afford a self-pay alternative to those with four but not five years of such service, all in accordance with Finding of Fact 81, *supra*. In regard to the future, the Plan as it now stands need not be amended.

21. Since the remedy sought and granted consists solely of an order that the Plan rules for

pension vesting be amended, no past benefits are sought or awarded, and the Fund can provide the remedy without reducing benefits, there is no need to determine whether any trustee could be held personally liable to reimburse the Fund under 29 U.S.C. § 1109(a).

22. The plaintiffs' request that the trustees be removed and replaced should be and is denied.

23. A final order, injunction, and judgment should now be entered on these findings and conclusions under the provisions of Fed. R. Civ. P. 54(b). A separate order will follow on plaintiffs' application for an award of attorney fees.

The clerk is directed to send copies of this memorandum decision to all counsel of record.

Dated: October 5, 1989.

William L. Dwyer
United States District Judge

B-41

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HELEN PHILLIPS, et al., Plaintiffs, v. ALASKA HOTEL AND RESTAURANT EMPLOYEES PENSION FUND, et al., Defendants.	NO. C86-1386WD FINAL ORDER AND INJUNCTION

This final order and injunction is based upon the court's memorandum decision filed on October 5, 1989, and on the findings of fact and conclusions of law set forth therein. It is hereby ordered, adjudged and decreed that:

1. The defendant Alaska Hotel and Restaurant Employees Pension Fund (the "Fund" or "Plan") is ordered to adopt and implement forthwith amendments to its pension plan as follows:

(a) To afford full pension vesting now to those class members (i.e., all non-vested partici-

pants in whose behalf contributions have been made to the Fund on or after January 1, 1973) who have had five or more years of credited service, subject to the following:

(i) A break in service of five years or more will have the effect of forfeiting prior years of credited service numbering less than five. The determination of what constitutes a break in service will be made in accordance with the Fund's current rules on that subject.

(ii) A class member's credited service prior to January 1, 1973, will be counted if the other requirements are met.

(iii) The level of retirement benefits to be paid to each class member will be the level that would apply if five-year cliff vesting had been afforded at the time the class member terminated from the Plan.

(iv) Each class member's entitlement to benefits under the provisions of this order will commence on November 1,

1989, or on the date of the person's retirement, whichever is later.

(b) To afford a self-pay alternative to class members who have had four but not five years of credited service, not interrupted by a break in service of five years, to permit then o qualify for five-year vesting. In this regard:

(i) The self-pay alternative will be conditioned upon the timely payment of a contribution computed as follows: the number of hours needed for a credited year at the time the class member terminated from the Fund, multiplied by the average hourly contribution for that class member during his or her most recent 100 hours of covered employment.

(ii) Participants who terminate from the Fund after October 31, 1989, will not be eligible for the self-pay alternative; i.e., it will not have prospective application.

(iii) The self-pay alternative will be kept available for a period of two years

following the mailing date provided for in paragraph 2, below.

2. The Fund will compose and distribute a notice to all class members explaining the foregoing rules modifications and the procedures by which class members may apply for and receive benefits. The form of notice will be subject to approval of the court. Defendants are directed to serve and file a proposed form, and a statement of the method and timing of its transmittal, on October 19, 1989. Plaintiffs may serve and file written comments on October 26, 1989, and defendants may reply on November 2, 1989. The Fund should specify in its submission whether it objects to the use of a search firm to help deliver notices initially returned by the post office. In issuing its order approving the form of notice, the court will set a date for mailing the notice to the class members. The Fund will report the results of the search and notification process on a quarterly basis, beginning April 2, 1990, until further order of he court.

3. Pending full compliance with this order and injunction, the Fund is directed to submit for advance approval by the court any proposed change in its benefit program other than the changes required by this order.

4. The initial draft of the court's memorandum decision, filed on July 27, 1989, stated that a final order would be entered when the proceedings relating to plaintiffs' application for an award of attorney fees were completed. Since then counsel have requested, and have been granted, three extensions of the briefing schedule on the attorney fee application. The pendency of that motion should not cause any further postponement of the entry of judgment on the main issues. Accordingly, the court now finds that there is no just reason for delay and directs the clerk to enter final judgment in accordance with this order and injunction. Fed. R. Civ. P. 54(b).

The clerk is directed to send copies of this

order to all counsel of record.

Dated: October 5, 1989.

William L. Dwyer
United States District Judge

APPENDIX C

ORDER

The opinion filed on September 10, 1991, is amended as follows:

Slip opinion at 12578, amend last sentence of second full paragraph to read:

> Judicial intervention in this complex area should be reserved for violations of the arbitrary and capricious standard which clearly cause excessive exclusion.

Slip opinion at 12579, amend first sentence of first full paragraph to read:

> We cannot say, however, that the Fund's failure to amend its standards so that another two to four percent of its participants could vest warrants judicial intervention.

Slip opinion at 12580, first paragraph, headnote 15, change paragraph to read:

> The district court also relied on its finding that the

> Fund's break-in-service rule contributed to the high exclusion rate by causing involuntary forfeitures of hours when employees were unable to find work that was covered under the Fund. There is no showing, however, that elimination or modification of the break-in-service rule would so substantially reduce the exclusion rate that it was arbitrary of the Fund to retain the rule.fn

The indicated footnote at the end of this paragraph will read:

> **fn.**The attack on the break-in-service rule in this case is based entirely on its alleged effect in excluding high percentages of workers from benefits. No argument has been made that the break-in-service rule is arbitrary simply because it makes no allowance for involuntariness of the break. *See Bolton v. Construction Laborers' Pension Trust*, No. 90-55654, slip op.

12211 (9th Cir. Aug. 30, 1991).

[Slip opinion at 12580, second paragraph, beginning "No additional role . . .", will then follow after the substituted paragraph.]

The panel has voted to deny the petition for rehearing, and Judge O'Scannlain has voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED** and the suggestion for a rehearing en banc is **REJECTED**.

APPENDIX D

A M E N D E D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-35735

HELEN PHILLIPS; CARSON K. WORKMAN; JOE AHLERS, and all others similarly situated,

Plaintiffs-Appellees

v.

ALASKA HOTEL AND RESTAURANT EMPLOYEES PENSION FUND,

Defendant- Appellant

No. 90-35144

HELEN PHILLIPS; CARSON K. WORKMAN; JOE AHLERS, aka Uwe Ahlers, and all others similarly situated,

Plaintiffs-Appellants

v.

ALASKA HOTEL AND RESTAURANT EMPLOYEES PENSION FUND, et al.,

Defendant-Appellee

APPEAL FROM the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE cam on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED.

Filed and entered: 09/10/91
Amended: 12/06/91